93-1081

Supreme
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

LEONARD GILLIS, VALDO SARGENI,
for Themselves and All Others Similarly Situated,
Petitioners,

v.

HOECHST CELANESE CORPORATION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether disclosure and employee understanding play any role in determining the "contractually-defined" benefits of welfare plans protected by the Employee Retirement Income Security Act.

2. Whether summary judgment may be granted to give effect to an unauthenticated document—not produced until nearly two years after a first request—as a "plan" which supercedes an admittedly applicable and public Merger Agreement and visible practice.

LIST OF PARTIES

The parties to the proceedings below were the Petitioners, Leonard Gillis and Valdo Sargeni, for themselves and all others similarly situated. Messrs. Gillis and Sargeni are former employees of Hoechst Celanese Corporation, the Respondent in this matter.

The Respondent before this Court is Hoechst Celanese Corporation. Hoechst Celanese Corporation and Hoechst Celanese Retirement Plan were parties in the proceedings below. Hoechst Celanese Corporation is a wholly-owned subsidiary of Hoechst, A.G., a German public stock corporation with its headquarters in Frankfurt, Germany. The names of all subsidiaries with public securities registrations for Hoechst Celanese Corporation and its parent for purposes of Rule 29.1 of this Court, are not presently known to Petitioners.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Leonard Gillis and Valdo Sargeni for themselves and all others similarly situated, respectfully pray that a writ of certiorari issue to review that portion of the judgment of the United States Court of Appeals for the Third Circuit entered in its case No. 92-1879 on September 7, 1993 dealing with severance pay issues. A timely petition for rehearing by the panel and *in banc* was denied on October 6, 1993.

OPINIONS BELOW

The decision and order of the Court of Appeals for the Third Circuit is reported at 4 F.3d 1137, 62 U.S.L.W. 2180 (3d Cir. 1993) and is reprinted in the Appendix to this Petition, page 1a, *infra,* along with the order on the petition for rehearing, p. 47a, *infra.*

The memorandum decision of the District Court is published as *Gillis v. Hoechst Celanese Corporation,* 818 F.Supp. 805 (E.D. Pa. 1992). It is reprinted in the Appendix to this Petition, p. 32a, *infra.*

STATEMENT OF JURISDICTION

A panel of the United States Court of Appeals for the Third Circuit entered its judgment on September 7, 1993, p. 1a, *infra.* With respect to severance pay issues, the Court affirmed the judgment of the United States District Court which granted summary judgment in favor of the defendants, p. 10a, *infra.* A combined petition for rehearing by the panel and suggestion of rehearing *in banc* pursuant to Fed.R.App.Pro. 40, 35, Local Appellate Rule (LAR) 35 and Internal Operating Procedure 9.5.1. (3d Cir.) was filed on September 21, 1993. The petition for rehearing was denied on October 6, 1993, p. 47a, *infra.* The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1), 2101(c), with respect to a petition for a writ of certiorari from a final judgment of the United States Court of Appeals for the Third Circuit.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1002 Definitions

For purposes of this title:

> (1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or

day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1021 Duty of Disclosure and Reporting

(a) The administrator of each employee benefit plan shall cause to be furnished in accordance with section 1024(b) to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan—

(1) a summary plan description described in section 1022(a)(1); and

29 U.S.C. § 1022 Plan Description and Summary Plan Description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b). The summary plan description shall include the information described in subsection (b), shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1).

29 U.S.C. § 1024 Filing With Secretary and Furnishing Information to Participants

(b) Publication of summary plan description and annual report to participants and beneficiaries of plan

Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary plan description, and all modifications and changes referred to in section 1022(a)(1) of this title—

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part.

The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 1022 of this title which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section 1022 of this title every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 1022(a)(1) of this title, a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

(2) The administrator shall make copies of the plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the plan was estab-

lished or is operated available for examination by any plan participant or beneficiary in the principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants (including such places as the Secretary may prescribe by regulations).

* * * *

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

29 U.S.C. § 1102 Establishment of Plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

* * * *

(b) Requisite features of plan

Every employee benefit plan shall—

* * * *

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

* * * *

STATEMENT OF THE CASE

Leonard Gillis, Valdo Sargeni and others similarly situated were employees of Hoechst Celanese Corporation at its plant located in Delaware City, Delaware. They were originally employed by American Hoechst Corporation, the U.S. subsidiary of Hoechst, A.G., a major German company. On November 2, 1986, American Hoechst Corporation agreed to merge with Celanese Corporation pursuant to the terms of a merger agreement of that date. In 1987, American Hoechst Corporation and Celanese formally merged to form Hoechst Celanese Corporation, a wholly-owned subsidiary of Hoechst, A.G.

The Merger Agreement explicitly provided for separation pay upon a "reduction in base pay," voluntary retirement, or other termination events caused "directly or indirectly" by Hoechst or the merged corporation. This separation pay plan applied "notwithstanding any other policy" of Hoechst Celanese and contained no provision for deference on interpretation.[1]

The Merger Agreement policy had a stated term from 1987 to March 11, 1989. The applicability of the severance pay policy in the Merger Agreement to individual employees was based on the date that a termination was *announced*—not the date of actual separation from payroll—according to the uncontradicted testimony of Ronald Silversten, Hoechst's chief witness and labor counsel. This was confirmed by actual payments under the Merger Agreement to employees located at a South Carolina facility whose layoff was announced before March, 1989 even though they actually left the Hoechst payroll after March, 1989.

Hoechst Celanese announced its intention to dispose of the Delaware City facility in early January, 1989.

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[1] *Sejman v. Warner Lambert Co., Inc.*, 889 F.2d 1346, 1348 (4th Cir. 1989) (prior policies are no longer applicable with change in plan sponsor).

Hoechst announced that employees would not be allowed to transfer and that employees offered a job by Mirrex would not be eligible for severance pay.

Mr. Gillis requested a copy of the separation pay policy from the Hoechst "Policies and Procedure" manual at that time. The Human Resources manager in Delaware City was unable to locate a copy of a Hoechst Celanese policy in the manuals maintained in Delaware City in 1989.[2] Similar personnel in Spartanburg, South Carolina could not locate a copy either, despite active payment of severance pay in Spartanburg at the time. Mr. Gillis did receive a copy of the Merger Agreement with its confirmation of the "tin parachute", of two weeks of severance pay, in response to a request to the Securities and Exchange Commission.

Hoechst Celanese made no formal disclosure at all concerning a severance pay policy for non-union or salaried employees despite the explicit terms of the Merger Agreement and other changes. The merged company did adopt and publish a set of corporate "VALUES" in February, 1988 through its Hoechst Celanese Update. These values promised "fair treatment for individuals in managing business change" and "[i]nformed employees . . . through open communication."[3] The employees of the

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[2] The procedure to issue a policy within Hoechst involved distribution of a policy to local Human Resources offices with a signed cover memo. This document was then placed in a "Policies and Procedure" or "P&P" manual at each location. Hoechst Celanese did in fact distribute a January 1, 1989 vacation pay policy to its various locations (and Mr. Gillis as a supervisor) under a standard cover memo on January 5, 1989 in accordance with this undisputed practice. Unlike the supposed January 1, 1989, severance pay policy, this document makes no mention of an "arbitrary and capricious" standard of review.

[3] The states have, virtually uniformly, upheld the right of employees to enforce such promises, as contracts. See *Bachelder v. Communications Satellite Corporation*, 657 F. Supp. 423, 427 n.4 (D. Me. 1987) (collecting cases).

Delaware facility knew about VALUES through the Update as well as employee meetings at the plant. Based on prior practices of American Hoechst, they actually believed that these undertakings would be fulfilled.

A set of brochures and Updates issued in 1988 promised a "balanced and equitable" integrated system of benefits which would apply uniformly to Celanese, former Celanese and the former American Hoechst Corporation employees. The 1988 booklets issued to employees focused attention on the prior Celanese benefit package—due to its larger employment base—as the adoption of Celanese benefits in a merger of pension plans shows. The employees knew that Celanese Corporation had a practice which included payment of severance pay upon the sale of a business based on widespread knowledge of a sale between Celanese and American Hoechst at Greer, South Carolina before the merger. The pattern of paying severance pay of two weeks per year of service for employees was confirmed in writing by at least one letter of the Hoechst Canada PVC film division. The grapevine at other plants indicated that such severance pay was awarded to former American Hoechst employees in Spartanburg, South Carolina who were separated from Hoechst in 1989 and to select Delaware City employees as well.

Hoechst Celanese ultimately entered a sales agreement with American Mirrex Corporation, a venture capital firm with no experience in the industry through a leveraged buyout, as a result of the merger. Hoechst retained substantial practical control of Mirrex as a customer. The employees also understood that Hoechst retained a legal interest through the debt or other instruments. Hoechst did acknowledge a separation pay for separation events within the six (6) months after the sale.

Hoechst Celanese terminated Gillis, Sargeni and other employees of the Delaware City, Delaware site from its payroll at the end of August, 1989. American Mirrex

reduced or eliminated pay and benefits. Basic "in-the-envelope" pay was slashed immediately through an overall and immediate reduction in vacation of one to two weeks across the board and elimination of all "accrued" vacation, "Flex" benefits, lost matching "401(k)" contributions and service award bonuses. Mirrex also eliminated retiree medical benefits and adopted no severance pay policy whatsoever. Mirrex dramatically reduced pension accruals and announced that it had cut off unreduced early retirement benefits upon a combination of age and service totaling 85 under the "Rule of 85"—an announcement substantiated by its actuarial valuations. This appeared to trigger at least an issue of fact concerning application of the direct or indirect "reduction in pay" eligibility standard of the Merger Agreement within the six months acknowledged by Hoechst.[4]

On June 6, 1990, Gillis and Sargeni made a formal written appeal concerning unpaid benefits and request for plan documents. A July 15, 1990 response from Ronald Silversten of the legal department of Hoechst Celanese Corporation, enclosed no documents. After the complaint was filed, Hoechst forwarded a separation pay policy document dated September 1, 1990 which supposedly applied to Plaintiffs' termination over a year earlier in August, 1989. The document now cited by Hoechst as the basis of its actions in 1989 was first produced in May 1991—nearly two years after the supposed decision. It exists only in the form of Xerox copies and is blank in the space for "issue date." No one present

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[4] C.f. *Massachusetts v. Morash*, 490 U.S. 107, 109 S. Ct. 1668, 1674 (1989) (vacation as wages); *Sly v. P.R. Mallory & Co., Inc.*, 712 F.2d 1209 (7th Cir. 1983) (severance pay to employees moved from salaried to hourly); *Shawver v. R.H. Macy & Co.*, 697 F. Supp. 1515, 1525-1526 (W.D. Mo., 1988) (lack of comparable package raises question of fact on severance pay exclusion for sale); *Taylor v. Continental Group Change in Control Plan*, 933 F.2d 1227, 1234 (3d Cir. 1991) (ambiguity in severance document creates triable question of fact).

at Hoechst headquarters in 1989 could authenticate the newly-discovered "policy."

The United States District Court for the Eastern District of Pennsylvania granted summary judgment in favor of Hoechst severance pay issues. The District Court concluded that the "plan" was the undisclosed "January 1, 1989" document and that Hoechst's decision to deny the employees' request for severance pay was not arbitrary or capricious. It rejected claims that disclosure is an indispensable element of the "contractually— defined benefits" of unfunded benefit plans under ERISA.

The decision of the District Court was appealed to the United States Court of Appeals for the Third Circuit under 28 U.S.C. § 1291. The Third Circuit Court of Appeals affirmed the decision of the District Court,[5] p. 10a, *infra.*

The panel decision of the U.S. Court of Appeals for the Third Circuit holds that an exception to severance pay on a sale of a division in a hidden severance pay "policy" which was never disclosed to employees nor even available can be applied to negate a separate binding Merger Agreement (filed with the SEC) and observed Hoechst Celanese practice. The Court apparently felt bound to this conclusion by a prior decision of the Court that ". . . the fact that the separation pay policy document was not distributed to the employees 'is irrelevant in determining entitlement to benefits,' *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310, 1319 (3d Cir. 1991), p. 6a, *infra.*

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[5] The supposed January, 1989 new separation pay policy miraculously includes the "arbitrary and capricious" language that this Court adopted in February, 1989 in *Firestone Tire & Rubber v. Bruch*, 489 U.S. 101, 107 (1989). The vacation pay policy which was in fact posted at the plant in 1989, conversely does not contain any provision for deference. This Court only resolved a split in the courts on ERISA coverage of unfunded vacation pay plans in April, 1989, *Massachusetts v. Morash*, 490 U.S. 107, 109 S.Ct. 1668 (1989).

REASONS FOR GRANTING THE WRIT

ERISA was designed to protect "contractually defined benefits," *Massachusetts Mutual v. Russell*, 437 U.S. 134, 105 S.Ct. 3085, 3093 (1989). See also, *Firestone Tire v. Bruch*, 489 U.S. 101, 113, 109 S.Ct. 948, 956 (1989). This is the core of the holding in *Massachusetts Mutual*, 105 S.Ct. at 3093, that "extra-contractual damages" are not available under ERISA—even though they may be available for bad faith in the administration of a trust.[6]

The element of *mutual* understanding based on disclosure is indispensable to all common law concepts of contract formation and interpretation with regard to employee benefits, *Hoefel v. Atlas Tack*, 581 F.2d 1, 3 (1st Cir. 1978) (employees not informed of change and thus did not agree to it); *Chapin v. Fairchild Industries*, 107 Cal. Rept. 111, 113 n.2 (Cal. Ct. App. 1973) (amendment to plan not disclosed to employees is not part of contract). It is improbable that ERISA ". . . would afford less protection to employees . . . than they enjoyed before ERISA was enacted," *Bruch*, 489 U.S. at 114, 109 S.Ct. at 956. The disclosure obligations of ERISA reflect a Congressional purpose of "ensuring that 'the individual participant knows exactly where he stands with respect to the plan'," *Bruch*, 489 U.S. at 118, 109 S.Ct. at 958.

ERISA plans have a common law base in the law of trusts and contract, *Firestone Tire v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 955 (1989). See also, *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 98 S.Ct. 2716, 2720 (1980) (state legislation affecting pension trust impairs contract between employer and employee). The Courts are to create a common law based on the common law of trusts with due regard to the special nature and purpose of employee benefit plans. H.R. Conf. Rept.

[6] See, e.g., *Gould v. Starr*, 558 S.W. 2d 755 (Mo. Supp. 1977).

93-1280, reprinted [1974] U.S. Code Congress & Adm. News at 5038, 5083. As observed in *Collins v. UMWA Funds*, 298 F.Supp. 964, 967 (D.D.C. 1969), the fundamental distinction in purpose and economics between a traditional common law trust and employee benefit plan is the non-gratuitous and compensatory nature of the employee benefit plan.

The common law of trusts would apply contract rules to unfunded promises to "trusts"—such as ERISA welfare plans, 1A Scott, *Law on Trusts*, Sections 26.5, 17.3, 30, pp. 239, 297-298, 315 (4th Ed. 1988). A contract to establish a trust creates no trust "corpus" until the conditions of the contract are satisfied, *id.*, 1A Scott, *Law of Trusts* at § 30, p. 315. C.f., *Berlin v. Michigan Bell*, 852 F.2d 1154, 1162 (6th Cir. 1988) (welfare funds have no corpus). The promis*ee* is treated as the "settlor" and simply holds the promise in trust, 1A Scott, *Law of Trusts*, §§ 17.3, 26.5, pp. 238-9, 297-8. As collected in 1A Scott, *Law of Trusts*, § 30.1, p. 320; § 26.5, pp. 297-8 (promise to fund trust creates trust only on transfer), the common law holds that the normal remedy for a breach of promise to create a trust by a transfer of funds is simply an action for contractual damages.[7]

Congress approached welfare plans with limited statutory language to refine common law concepts to the context of a mass contract created by mutual conduct and practice rather than words.[8] 29 U.S.C. § 1002(1), (2)

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[7] C.f., *Massachusetts Mutual v. Russell*, 437 U.S. 134, 105 S.Ct. 3085 (1989) (punitive damages not available in welfare fund context, consistent with the common law on contracts).

[8] ERISA codifies a strain of common law about the creation of a contract by an exchange of employer conduct accepted by the work of employees without any of the words or documents so central to a standard bilateral contract. See, e.g., *Hill v. Aetna Insurance Company*, 181 Cal. Rptr. 564, 568, 570 (Cal. Ct. App. 1982); *Morosetti v. Louisiana Land and Exploration*, 522 Pa. 492, 564 A.2d 151, 155 (Pa. 1989) (Larsen, J., dissenting) (conduct can convey a promise for the Restatement of Contracts). C.f. *Scott, Law of*

define a "plan" as a "plan, fund or program," with no mention of a writing. The Department of Labor and Courts of Appeals have interpreted this language to mean practice—not a writing—in a series of cases beginning with *Donovan v. Dillingham*, 688 F.2d 1367, 1372, (11th Cir. 1982) (en banc). The development of this law was summarized in *Deibler v. UFCW Local Union 23*, 973 F.2d 206, 209 (3d Cir. 1992):

> . . . ERISA itself does not provide a definition of the word "plan." *The term is clearly not intended as a requirement of a writing. . . .* In *Donovan* [*v. Dillingham*], the Eleventh Circuit formulated the prevailing standard for determining whether a "plan" within the meaning of ERISA has been established:
>
> > In summary, a "plan, fund or program" under ERISA is established if from surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits.
> >
> > * * * *
> >
> > Whether a plan exists within the meaning of ERISA is "a question of fact, to be answered in light of all the surrounding facts and circumstances from the point of view of a reasonable person."

This simply restates the objective theory of contracts, per Calamari & Perillo, *On Contracts*, pp. 14-15 (1st Ed. 1970), that "[a] party's intention will held to be what a reasonable man in the position of the other party would conclude his manifestations to mean". As occurred in *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90, 96 (3d Cir. 1992), a court must piece together the terms of a contract from evidence of conduct in the absence of a dispositive disclosed document.

Trusts, § 26.5, p. 299 (conduct and statements can be read as a declaration of trust). Its writing requirements build on the history of mass contracts for an industry under the National Labor Relations Act, *see*, n.9, *infra*.

Congress allowed—indeed, required—employers to "integrate" and memorialize the terms of benefit plans by putting them in writing, 29 U.S.C. § 1102(a). This written plan is then disclosed to employees, 29 U.S.C. §§ 1102(a)(1), 1021(a), 1022(a)(1), 1024(b). This obligation is ministerial as the ". . . written instrument, . . . —[requirement is] not part of the definition of 'plan'." *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1503 (9th Cir. 1985). A failure to integrate and disclose a document is "merely . . . a failure . . . to comply with ERISA," *id.* Were it otherwise, per *Memorial Hospital System v. Northbrook Life Ins. Co.*, 904 F.2d 236, 241 (5th Cir. 1990), "employers could avoid federal regulation merely by failing to memorialize their employee benefit programs in a separate document." [9]

I. THE COURTS OF APPEAL ARE IN IRRECONCILABLE CONFLICT AND DISARRAY OVER THE ROLE OF DISCLOSURE AND EMPLOYEE UNDERSTANDING IN DEFINING THE TERMS OF AN EMPLOYEE BENEFIT PLAN.

The Courts of Appeal are hopelessly confused about the effect of disclosure and employee understanding in defining rights under an employee benefit plan. They need the intervention of this Court to clear away the underbrush of past confusion by establishing a clear principle that disclosure and mutual understanding are an indispensable element of any "contractually-defined" benefit.

A. The View That a Lack of Disclosure Is Irrelevant—The Plan As A Gratuitous Trust.

The Third Circuit in this case has taken the extreme view that the fact that a benefit policy was not made available to participants is "irrelevant in determining entitle-

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[9] C.f. 29 U.S.C. § 158(d) (requirement to reduce oral labor agreement to writing); *H.J. Heinz v. NLRB*, 311 U.S. 514, 61 S.Ct. 320, 324-326 (1941) (unfair labor practice arises from failure to reduce actual agreement to writing).

ment to benefits." *Gillis v. Hoechst Celanese*, 4 F.3d 1137, 1141 (3d Cir. 1993) quoting *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310, 1319 (3d Cir. 1991). This follows another overly broad decision holding that disclosure could be rendered illusory simply by including a reserved power to amend the plan—clear overkill to correct a simple printer's error, *Hamilton v. Air Jamaica, Inc.*, 945 F.2d 74 (3d Cir. 1991). The conclusion that a plan is in fact a writing, in the fashion of gratuitous trust, and that an employer can retroactively revoke a compensation promise which his actions conveyed throws contract principles out the window.

The Third Circuit has gone to particular extremes in this case in holding that an unauthenticated document can override a Merger Agreement of admitted applicability. The Third Circuit grants summary judgment in this case based on a supposed 1989 plan despite the absence of authenticating testimony concerning adoption of the purported "plan," and in the face of evidence that it could not be found in 1989, the absence of an "issue date" and belated production nearly two years after the fact and well after the lawsuit began. In *Biggers v. Wittek Industries, Inc.*, 4 F.3d 291 (4th Cir. 1993), the Fourth Circuit rejected a similar claim on virtually identical facts in order to side-step the issue of disclosure.

B. The View That Partial Disclosure Can Estop Enforcement Of An Available Formal Document—Partial Disclosure Is Deadly But Blatant Violators Walk Away Free.

The Sixth Circuit adopted a different view of the balance between a "writing" and disclosure in *Edwards v. State Farm Mutual Auto Insurance Co.*, 851 F.2d 134, 136 (6th Cir. 1988) concluding that statements in a summary plan description that is distributed to employees "are binding and if such statements conflict with those in the plan itself, the summary shall govern." It endorsed the analysis of the Eleventh Circuit that:

> It is of no effect to publish and distribute a plan summary booklet designed to simplify and explain a voluminous and complex document and then proclaim that any inconsistencies will be governed by the plan. Unfairness will flow to the employee for reasonably relying on the summary booklet.

McKnight v. Southern Life and Health Insurance Co., 758 F.2d 1566, 1570 (11th Cir. 1985).

The Sixth Circuit has not found it even necessary for an employee to rely on the actual text of the summary plan description in order to prevail, *Edwards*, 851 F.2d at 137. The First Circuit, *Bachelder v. Communications Satellite Corp.*, 837 F.2d 519, 522-523 (1st Cir. 1988); *Govoni v. Bricklayers Masons & Plasterers*, 732 F.2d 250, 252 (1st Cir. 1984), Second Circuit, *Heidgerd v. Olin Corporation*, 906 F.2d 903, 907-908 (2d Cir. 1990), Fifth Circuit, *Hansen v. Continental Insurance Co.*, 940 F.2d 971, 981-982 (5th Cir. 1991), Seventh Circuit *Fuller v. CBT Corporation*, 905 F.2d 1055, 1060 (7th Cir. 1990) and apparently, the Ninth Circuit, *Arnold v. Arrow Transportation Co. of Delaware*, 926 F.2d 782, 885 n.3 (9th Cir. 1990) and the Eleventh Circuit, *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1578-1579 (11th Cir. 1992), concur in this approach as long as the employee relied on the summary plan description in the sense of having read it. This approach has set some courts to counting the angels on the head of a pin in seeking to distinguish an informal, but formal, "summary plan description" from other documents, *Gridley, supra.*

The potential problem lurking in this approach is a disincentive for good faith attempts at compliance. An approach which gives effect to a summary plan description—despite the availability of a formal plan document —threatens to burden employers with unexpected benefits. It creates some doubt about the statutory purpose behind the requirement for actual production of documents in 29 U.S.C. § 1024(b)(2), (4).

The approach conversely visits no sanctions whatsoever on an employer who simply violates the statute and makes no disclosure whatsoever. This was one undesirable trait of the common law, c.f., *Morosetti v. Louisiana Land and Exploration Co.*, 522 Pa. 492, 564 A.2d 151 (Pa. 1989) (employer who kept policy confidential made no "offer" to create a contract), which Congress clearly sought to override in enacting reporting and disclosure requirements. Speaking separately as counsel for benefit plans with nearly two billion dollars in assets, the combination of the summary plan description doctrine of *Edwards* and Third Circuit rules about the irrelevance of disclosure make it difficult to counsel a client to comply voluntarily with the statute.

A related sideshow on disclosure is raging in all of the Courts of Appeal over the availability of promissory estoppel or misrepresentation as a basis of recovery under ERISA. One school holds that no representation other than a formal plan document can create rights—citing, once again, a supposed "writing" requirement for an enforceable employee benefit claim, *Elmore v. Cone Mills Corp.*, 6 F.3d 1028 (4th Cir. 1993); *Hozier v. Midwest Fasteners*, 908 F.2d 1155, 1163 (3d Cir. 1990) (collecting cases from Second, Fourth, Fifth, Sixth, Tenth and Eleventh Circuits). A different trail of cases looks to the "fiduciary" nature of an employee benefit plan to impose liability for misrepresentation—including omissions in the context of a fiduciary relationship, *Berlin v. Michigan Bell Telephone Company*, 858 F.2d 1154, 1163-1164 (6th Cir. 1988); *Eddy v. Colonial Life Ins. Co. of America*, 919 F.2d 747, 750 (D.C. Cir. 1990) (citing Restatement (Trusts) 2d, Section 173); *Nichols v. Asbestos Workers Pension Plan*, 835 F.2d 881, 894 n.100 (D.C. Cir. 1987). See also, *Payonk v. HMW Industries*, 883 F.2d 221, 231, 232 (3d Cir. 1989) (Stapleton and Mansmann, JJ. concur that affirmative misrepresentations are actionable). *Black v. TIC Investments, Inc.*, 900 F.2d 112, 114-5 (7th Cir. 1990) collects the conflicting

cases from multiple circuits allowing promissory estoppel and holds—under simple common law contract principles —that a benefit promise, oral or written, should be enforceable as such absent harm to innocent third parties.

C. The View That A Lack Of Disclosure Can Create Benefit Rights.

A third view holds that procedural violations of disclosure reporting on fiduciary duties may "work a substantive harm" which can be redressed by granting benefits, *Blau v. DelMonte Corp.*, 748 F.2d 1348, 1354 (9th Cir. 1985). The purpose of this approach is to deter employers from blatant violation of the statute, *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320, 329 (4th Cir. 1985). The point at which disclosure violations turn into "substantive harm" and, indeed, the very meaning of that phrase, are cloaked in case-by-case mystery.

Blau and *Harris v. Pullman Standard, Inc.*, 809 F.2d 1495, 1499 (11th Cir. 1987) appear to equate "substantive harm" with an absence of disclosure—potentially creating benefits never expected by employees. The Seventh Circuit in *Kreutzer v. A. O. Smith Corp.*, 951 F.2d 739, 743 (7th Cir. 1991) appears to have equated "substantive harm" with bad faith, active concealment or inducement to reliance on a faulty plan summary. A third approach appears to equate "substantive harm" with proof of an actual right to benefits—thus rendering the analysis completely circular, *Veilleux v. Atochem North America, Inc.*, 929 F.2d 74, 76 (2d Cir. 1991).

D. The View That "Contractually-Defined" Benefits Must Rest On Disclosure And Mutual Understanding—The Objective Theory Of Contractual Trusts Adopted By Congress.

The final trail of cases looks at welfare plans "in accordance with contract principles," *Jacobs v. Pickands Mather & Co.*, 933 F.2d 652, 656 (8th Cir. 1991); *Bellino v. Schlumberger Technologies, Inc.*, 944 F.2d 26,

29 (1st Cir. 1991); *Taylor v. Continental Group Change and Control Plan*, 933 F.2d 1227, 1232 (3d Cir. 1991); *Audio Fidelity v. Pension Benefit Guaranty Corp.*, 624 F.2d 513, 517 (4th Cir. 1980); *In Re: White Farm Equipment*, 788 F.2d 1186, 1191 (6th Cir. 1986); *Howe v. Varity Corp.*, 896 F.2d 1107, 1109 (8th Cir. 1990); *Pratt v. Petroleum Prod. Mgmt. Employee Sav. Plan*, 920 F.2d 651, 661 (10th Cir. 1990). This analysis readily explains the decisions precluding use of undisclosed or secret documents to define the rights of employees, *Blau*, 748 F.2d at 1355; *Frank v. Colt Industries*, 910 F.2d 90, 98 (3d Cir. 1990) (undisclosed corporate minutes); *Heidgerd v. Olin Corp.*, 906 F.2d 903, 907 (2d Cir. 1990) (undisclosed "plan" to contradict booklet); *Kreutzer v. A. O. Smith Corp.*, 951 F.2d 739, 750 (7th Cir. 1991) (Eschbach, J., dissenting); *Adcock v. Firestone Tire & Rubber Co.*, 616 F. Supp. 409, 419 (M.D. Tenn. 1985) (confidential manual not part of severance pay "offer"), reversed, 822 F.2d 623 (6th Cir. 1987). See also, *Hoefel, supra; Chapin, supra.* This reflects the fact, per *Taylor v. Continental Group Change in Control Plan*, 933 F.2d 1227, 1232 (3d Cir. 1991), that employee benefit plan contract "interpretation requires determining the intent of both contracting parties."

The welfare plan "contract" is not locked in stone. An employer may amend the terms simply by communicating a change before an event fixing liability, *Audio Fidelity v. PBGC*, 624 F.2d 513 (4th Cir. 1980) (subsequent change ineffective); *Pratt*, 920 F.2d at 661-663 (same). Compare, *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 935-937 (5th Cir. 1993) (employees notified of change in advance). This is not an unreasonable burden to balance employee expectations against an employer's need for flexibility in adjusting benefit structures.

II. A CLEAR STATEMENT OF EMPLOYEE RIGHTS IS NECESSARY TO PROTECT A PRIVATE SECTOR MULTI-STATE OPTION IN THE CURRENT HEALTH CARE DEBATE.

The issue of employee benefit rights in welfare plans has immediate importance for the current debate concerning health care reform—an issue affecting some 8-12% of the gross national product. A line of federal decisions suggesting that employees are subject to arbitrary whim and caprice and after-the-fact changes in benefits has no long term political viability and tilts the debate in favor of a return of regulation to the states and common law. With efforts to remove ERISA regulation and preemption of state law on welfare benefits afloat in the current debate over health care reform, the Court must speak now to preserve a private sector multi-state benefit option or, perhaps, watch passively as Congress repeals ERISA coverage of welfare plans as an experiment which failed.

The current Administration proposals on health care reform include a substantial restriction of ERISA and its preemptive provisions in order to return health care and insurance regulation to the states and a National Health Board with substantive benefit authority, H.R. 3600, §§ 8402 (preemption); 1501 (National Health Board); 1014, 1221 *et seq.* (state option for single payer system); S. 1757 (same sections). A major competing bill(s) would establish a national single payer system, H.R. 1200; S. 491. Other legislation has passed the House to limit preemption of state law in other areas, H.R. 1036.

There clearly already is an active lobby to overturn this Court's decision against punitive damages in *Massachusetts Mutual v. Russell*, 437 U.S. 134 (1989)—a lobby perhaps lacking a politically-attractive lance. The decision in *McGann v. H&H Music*, 946 F.2d 401 (5th Cir. 1991), allowing a retroactive change in welfare

benefit plans—after an illness creating a continuing claim arose—was promptly overridden by the Americans With Disabilities Act. The retiree groups angered by perceptions of similar revocation of prior promises on post-retirement welfare benefits already have successfully enacted an amendment to the Bankruptcy Code on such matters, 11 U.S.C. § 1114. A return of health and benefit insurance regulation to the states or a National Board leads easily to the simple elimination of ERISA with respect to ancillary welfare benefits—such as the severance pay claim at issue in this case—in favor of treatment of all short term benefits as wages.

The loss of opportunities for dual experimentation—by the states at the government level and on a multi-state basis by larger corporations—in the context of health care reform may seriously damage the country. The feasibility of diverse state-run programs in the major metropolitan areas of the East Coast is, at best questionable. The input of the Court now on disclosure and benefit rights is critical in order to avoid a possible Congressional decision to repeal ERISA regulation of welfare benefits as a misguided experiment.

CONCLUSION

The Court has not directly addressed the basis of employee rights in welfare plans under ERISA in the nearly twenty years since the law passed. The time has now come. The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

Filed September 7, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1879

LEONARD GILLIS,
for themselves and all others similarly situated,
as a class;

VALDO A. SARGENI,
for themselves and all others similarly situated,
as a class;

v.

HOECHST CELANESE CORPORATION; HOECHST CELANESE RETIREMENT PLAN, a federal employee pension benefit plan and trust.

Third-Party Plaintiffs

v.

AMERICAN MIRREX CORPORATION, a Delaware Corporation; AMERICAN MIRREX RETIREMENT PLAN, a federal employee benefit plan and trust.

Third-Party Defendants

LEONARD GILLIS and VALDO SARGENI,
for themselves and all others similarly situated,

Appellants

Appeal from the United States District Court
for the Eastern District of Pennsylvania

D.C. Civil No. 90-05542

Argued May 17, 1993

BEFORE: STAPLETON, ALITO and SEITZ,
Circuit Judges.

Filed: September 7, 1993

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OPINION OF THE COURT

SEITZ, *Circuit Judge.*

Leonard Gillis and Valdo Sargeni ("plaintiffs") are former employees of the Hoechst Celanese Corporation ("Hoechst"). They allege that Hoechst and the Hoechst Celanese Retirement Plan ("Hoechst Retirement Plan") have failed to comply with certain provisions of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461. They also advance two state law claims.

The district court had jurisdiction over the ERISA claims under 29 U.S.C. § 1132 and jurisdiction over the state law claims under 28 U.S.C. § 1367(a). We have jurisdiction over plaintiffs' appeal from a final order of the district court pursuant to 28 U.S.C. § 1291.[1]

I. BACKGROUND

Hoechst sold its PVC Division in Delaware City, Delaware to the American Mirrex Corporation ("American Mirrex") in 1989. It is not disputed that plaintiffs, who were employed in the PVC Division, have continued to work in their same positions for their new employer, American Mirrex.

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[1] We directed the parties to file briefs on the issue of whether we had jurisdiction over this appeal in light of the fact that the district court amended the order appealed from after plaintiffs filed their notice of appeal.

We conclude that the September 28, 1992, order appealed from was a final judgment which disposed of all claims between the parties. Thus, plaintiffs were not required to file a second notice of appeal after the district court later amended the September 28, 1992, order to make certain corrections of a clerical nature. *See* Fed. R. Civ. P. 60(a); *Barris v. Bob's Drag Chutes & Safety Equip., Inc.*, 717 F.2d 52, 55 (3d Cir. 1983) ("[A] motion to correct a clerical mistake does not affect the finality of the original judgment nor does it toll the time limits within which an appeal must be taken." (citations omitted)); *Aloe Coal Co. v. Clark Equip. Co.*, 816 F.2d 110, 113 (3d Cir.) (same), *cert. denied*, 484 U.S. 853 (1987).

In August of 1990, plaintiffs filed the complaint in this action advancing six separate claims arising from the sale. The district court granted plaintiffs' request for certification as class representatives for their claim under ERISA that Hoechst improperly denied them severance pay and their state law claim that Hoechst improperly denied them vacation pay. The district court denied plaintiffs' request for certification as class representatives for their claim under ERISA that Hoechst and the Hoechst Retirement Plan (collectively "defendants") failed to transfer sufficient funding to the American Mirrex Retirement Plan to fund their early retirement benefits and for their claim that defendants should be penalized for reporting and disclosure violations of ERISA.[2] Each plaintiff brought one of the two remaining claims in his individual capacity.

Plaintiff Sargeni alleged that Hoechst breached a contractual obligation to provide him with counseling concerning his benefit options at the time it sold the PVC Division. Plaintiff Gillis contended that Hoechst violated ERISA by failing to give him seniority credit for two years that he worked at a Hoechst plant in Canada.

In June of 1992, defendants filed a motion seeking summary judgment or dismissal of all claims. The district court issued a memorandum and order granting summary judgment for defendants on all claims except the vacation pay claim and the breach of contract claim which were both based on state law. It dismissed those claims for lack of subject matter jurisdiction. It also denied plaintiffs' motion for partial summary judgment. Plaintiffs then filed this timely appeal.

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[2] The district court subsequently denied plaintiffs' motion for reconsideration of its order denying class certification on these two claims.

II. DISCUSSION

On this appeal from a grant of summary judgment, "[t]he non-movant's allegations must be taken as true and, when these assertions conflict with those of the movant, the former must receive the benefit of the doubt." *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). In addition, "[i]nferences to be drawn from the underlying facts contained in the evidential sources submitted to the trial court must be viewed in the light most favorable to the party opposing the motion." *Id.* Our review is plenary. *Id.*

We turn first to a review of that portion of the district court's order granting summary judgment for defendants.

A. Claims Disposed of By Summary Judgment

1. Severance Benefits

Simply stated, plaintiffs argue that their employment with Hoechst was "severed" when the PVC Division was sold and, therefore, they are entitled to severance pay. Hoechst's Corporate Human Resource Department ("the Department") denied plaintiffs' request for severance pay and the district court granted summary judgment for Hoechst on this claim after concluding that the Department's denial was not arbitrary or capricious.

As a threshold matter, we must consider plaintiffs' argument that the district court erred when granting summary judgment by relying upon a document identified by Hoechst as the Hoechst Celanese Separation Pay Policy. Plaintiffs allege that this document was fabricated by Hoechst after the date on which plaintiffs requested severance pay. The authenticity of this document is important for two reasons. First, the district court relied on the document when determining the eligibility requirements for severance pay. Second, the district court also

relied on this document when determining the degree of scrutiny with which it reviewed the decision by the Department to deny these benefits. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) (holding that a court should review a plan administrator's denial of benefits under a de novo standard unless the plan grants the administrator discretion when making eligibility decisions, in which case an arbitrary and capricious standard applies).

Because plaintiffs have no direct evidence that the document was fabricated after-the-fact, they rely exclusively on circumstantial evidence. Plaintiffs first assert that the document was not distributed to the employees at the PVC Division and was not produced until after they made their claim for severance pay. Indeed, defendants concede, as they must, that "[t]here is, in the record below, an admitted failure to supply a copy of the [separation pay] plan on a timely basis to the plaintiffs." (Tr. of oral argument at 32). However, standing alone, the fact that the separation pay policy document was not distributed to the employees is "irrelevant in determining entitlement to benefits." *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310, 1319 (3d Cir.), *cert. denied*, 111 S. Ct. 2856 (1991).

Plaintiffs also note that the document pre-dates the Supreme Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and yet utilizes the "arbitrary and capricious" standard which was adopted by the *Bruch* Court. However, use of the arbitrary and capricious standard was not uncommon in the years before *Bruch* was decided. *See Bruch*, 489 U.S. at 107 (stating that, at the time *Bruch* was decided, "most federal courts [were] review[ing] the denial of benefits by ERISA fiduciaries and administrators under the arbitrary and capricious standard").

We conclude that plaintiffs' circumstantial evidence is insufficient to create a genuine issue of material fact as

to the authenticity of the separation pay policy document produced by Hoechst. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-52 (1986). Accordingly, we turn to a review of the terms of that document.

The Hoechst Celanese Separation Pay Policy contains the following provision:

> *Administration and Interpretation*
>
> The Corporate Human Resources Department is responsible for administering this policy, issuing procedures and local guidelines, and handling any questions of policy interpretation, as well as determining the rights of any person to benefits under this policy. The decisions of the Corporate Human Resources Department shall be binding unless arbitrary and capricious.

(J.A. at 2708).

Under this provision, the Department was given discretion to interpret the terms of the separation pay policy when making eligibility determinations. Consequently, we apply the arbitrary and capricious standard when reviewing the Department's determination to deny plaintiffs' request for benefits. *See Bruch*, 489 U.S. 101; *Stoetzner v. United States Steel Corp.*, 897 F.2d 115, 119 (3d Cir. 1990) ("[T]he arbitrary and capricious standard [applies] because the plan contains provisions which give[] the administrator discretion in making eligibility determinations.").

We have explained that when the arbitrary and capricious standard applies the decisionmaker's determination to deny benefits must be upheld unless it was "clear error" or not "rational." *Shiffler v. Equitable Life Assurance Soc'y*, 838 F.2d 78, 83 (3d Cir. 1988). To determine whether the Department's denial of plaintiffs' benefits was irrational or clearly erroneous here, we turn to an examination of the pertinent separation pay policy provisions governing eligibility.

The Hoechst Celanese Separation Pay Policy states:

> 1. *Policy*
>
> It is the policy of Hoechst . . . to provide separation pay to eligible employees resulting from certain types of involuntary terminations of employment. . . .
>
> 2.1 *Eligibility*
>
> All regular, full-time, salaried employees . . . who are involuntarily terminated from active employment due to
>
> . . .
>
> —sale of all or part of a business (**where the acquiring or purchasing company does not offer continued employment)**
>
> . . .
>
> are *eligible* for separation pay.
>
> 2.2 All regular, full time, salaried employees who are terminated by reason of
>
> . . .
>
> — any other person not specified in 2.1 are *ineligible* for separation pay.

(J.A. at 3145) (bolding added, italics in original). In light of the parenthetical exclusion within section 2.1, it appears that Hoechst intended to deny severance pay to any employees who were offered continued employment with the purchasing company when the division in which they worked was sold. Thus, the Department's decision to deny severance benefits to plaintiffs does not appear to have been irrational or clearly erroneous. Nevertheless, plaintiffs argue that summary judgment was unwarranted for several reasons.

First, plaintiffs argue that they are entitled to severance benefits under certain documents other than the separation pay policy document discussed above. One document plaintiffs seek to rely upon is a 1986 Agreement of

Merger between the companies that combined to form Hoechst. However, even if we assumed that this merger agreement could alter or override the separation pay policy discussed earlier, it did not provide severance pay for any employees who left employment after February of 1989—months before plaintiffs ceased working for Hoechst. (J.A. at 3439).

Plaintiffs also seek to rely upon "VALUES" brochures which Hoechst distributed to its employees.[3] However, as the district court noted, the VALUES booklets contained the following disclaimer:

> This booklet summarizes certain plan documents and contracts. If there is a difference between this booklet and the documents or contracts, then the documents and contracts will govern. . . .

(J.A. at 3393); *see Gillis v. Hoechst Celanese Corp.*, 818 F. Supp. 805, 809 (E.D. Pa. 1992). In light of this disclaimer, we conclude that, under ERISA, these documents were, at most, summary plan descriptions. Accordingly, the plan document (i.e., the separation pay policy document) controls and the plaintiffs "cannot recover under 29 U.S.C. § 1132(a)(1)(B) [of ERISA] for benefits allegedly due under a summary plan description." *Gridley*, 924 F.2d at 1318.

Finally, plaintiffs argue that Hoechst is equitably estopped from denying them severance benefits. When a plaintiff asserts an equitable estoppel claim based on an ERISA reporting and disclosure violation, the plaintiff must satisfy more than simply the "ordinary elements" of equitable estoppel. *Gridley*, 924 F.2d at 1319.[4] As we

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[3] Plaintiffs do not contend that these brochures contain any statements expressly referring to severance pay. Plaintiffs rely, instead, on a "promise of 'fair treatment' in managing business change." (Pls.' Br. at 36).

[4] The "ordinary elements" of equitable estoppel include: "(1) a material representation, (2) reasonable reliance upon that representation, and (3) damage resulting from that representation." *Gridley*, 924 F.2d at 1319.

stated when rejecting a similar claim: "Our precedents indicate that an ERISA reporting or disclosure violation . . . cannot provide a basis for equitable estoppel . . . in the absence of 'extraordinary circumstances.' " *Id.* Plaintiffs, who were offered and accepted employment with American Mirrex, failed to introduce evidence that they were victims of "extraordinary circumstances." Indeed, just as in *Gridley,* "the present case does not even satisfy the ordinary elements of the doctrine of equitable estoppel" because plaintiffs failed to introduce any evidence that they relied upon their expectation of severance pay. Thus, plaintiffs have failed to introduce sufficient evidence to withstand summary judgment on this claim.

In view of the foregoing analysis, we conclude that the district court properly granted summary judgment for defendants on the plaintiffs' class action claim for severance benefits.

2. Early Retirement Benefits

Plaintiffs argue that Hoechst underfunded the American Mirrex Plan in violation of 29 U.S.C. § 1058, because Hoechst allegedly failed to transfer sufficient assets to fund plaintiffs' early retirement benefits. Hoechst counters that "ERISA does not protect or regulate these benefits for plaintiffs" and, "[a]s a matter of law, therefore, plaintiffs have no claim for underfunding or even for outright elimination of this benefit." (Defs. Brief at 17). The district court concluded that plaintiffs' right to early retirement benefits is not protected by ERISA because neither plaintiff satisfied the eligibility requirements for early retirement at the time the PVC Division was sold.

To be eligible for early retirement benefits under the Hoechst Retirement Plan, the sum of an employee's age and years of service for the plan sponsor must be at least 85 (e.g., 55 years of age with 30 years of service). It is undisputed that neither plaintiff qualified for early retirement under this so-called "rule of 85" on the date that Hoechst sold the PVC Division to American Mirrex.

Nevertheless, plaintiffs argue that ERISA protects their right to qualify for early retirement benefits under the Hoechst Retirement Plan at some point in the future. As a corollary to this argument, plaintiffs contend that defendants must credit their years of service with their new employer, American Mirrex, in determining whether they satisfy the rule of 85. Plaintiffs thus raise an important issue that has not yet been decided by this court.

We turn to a review of that portion of the district court's order which granted summary judgment for defendants on this claim for early retirement benefits. Our review begins with an examination of ERISA and an application of the pertinent sections of that statute to the undisputed material facts on which this claim is based.

ERISA was enacted, in part, "to protect . . . the interests of participants in employee benefit plans . . . ." 29 U.S.C. § 1001(b). Congress was concerned that "many employees with long years of employment [were] losing anticipated retirement benefits" because of the inadequate funding of pension plans. *Id.* § 1001(a). Consequently, although ERISA does not require employers to provide pension benefits, it does mandate certain minimum standards (i.e., funding, vesting and participation) for plans which employers voluntarily establish for their employees. *See, e.g.*, 29 U.S.C. § 1053.

Prior to 1984, ERISA did not protect early-retirement benefits. *See Gluck v. Unisys Corp.*, 960 F.2d 1168, 1185 (3d Cir. 1992) ("ERISA permitted the reduction of early retirement benefits prior to July 31, 1984, but not after."). In 1984, however, Congress amended ERISA by enacting the Retirement Equity Act of 1984 ("REA"), Pub. L. No. 98-397, 98 Stat. 1426 (1984). The REA amended Section 204(g) of ERISA to protect early retirement benefits under certain circumstances. Therefore, our inquiry into whether ERISA protects plaintiffs' right to early retirement benefits must begin with an examination of the language of Section 204(g).

See United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) ("The task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself.").

As amended, Section 204(g) states:

> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title.
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> (2) For purposes of paragraph (1), a plan amendment which has the effect of—
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> > (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
> >
> > (B) eliminating an optional form of benefit.
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. . . .

29 U.S.C. § 1054(g).

Subsection (g)(1), sets forth a general prohibition against plan amendments which reduce accrued benefits. Subsection (g)(2) provides that, under certain circumstances, a plan amendment which reduces early retirement benefits is to be treated as an amendment prohibited by subsection (g)(1)—i.e., as a plan amendment which reduces accrued benefits. We turn to the parties' contentions on whether defendants violated this section.

Plaintiffs argue that defendants' stated position that plaintiffs are not entitled to early retirement benefits un-

der the Hoechst Retirement Plan is tantamount to an "amendment" of the Hoechst Retirement Plan as that term is used in Section 204(g). Plaintiffs then argue that Section 204(g)(2) prohibits such amendments unless defendants give plaintiffs the opportunity "after the amendment" to satisfy "the preamendment conditions" for early retirement benefits. 29 U.S.C. § 1054(g)(2).

Plaintiffs' interpretation of Section 204(g) is entirely plausible. However, if we were to confine our inquiry strictly to the statutory language, we could not say that it was the only possible interpretation of the statute. Indeed, plaintiffs concede that the statutory language is "somewhat convoluted." (Pls.'s Brief at 25).

Defendants note that, by its terms, Section 204(g)(2) only prohibits a plan amendment which does away with early retirement benefits if there is the possibility that a participant could "satisf[y] (either before or after the amendment) the preamendment conditions for the subsidy." 29 U.S.C. § 1054(g)(2). Defendants argue that plaintiffs do not fall within the class of persons who might satisfy the preamendment conditions (e.g. years of service for the plan sponsor) because they no longer work for Hoechst. Therefore, defendants argue, an amendment of the Hoechst Retirement Plan to eliminate plaintiffs' right to qualify for early retirement benefits is not prohibited by Section 204(g)(2).

Both plaintiffs' and defendants' arguments find some measure of support in the language of the statute. We conclude that the statutory language of Section 204(g), standing alone, fails to provide any clear answer to the issue before this court.[5] Accordingly, we turn to other sources to aid in interpreting this statutory provision.

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[5] Our conclusion that Section 204(g) is somewhat ambiguous is consistent with an earlier case where we sought guidance from external sources when interpreting this same statutory section. *See Berger v. Edgewater Steel Co.*, 911 F.2d 911, 918 (3d Cir. 1990) (quoting statute's legislative history), *cert. denied*, 111

If this case did not involve ERISA, at this point our inquiry might turn immediately to the statute's legislative history. *See, e.g., Ardestani v. INS*, 112 S. Ct. 515, 523 (1991) (resorting to legislative history is appropriate where meaning of statute is ambiguous); *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1150 (1992) (Stevens, J., concurring) ("Whenever there is some uncertainty about the meaning of a statute, it is prudent to examine its legislative history."). When interpreting ERISA's provisions, however, we sometimes have the benefit of yet another source. Section 204(g), like many other sections of ERISA, has a mirror-like counterpart in the Internal Revenue Code ("IRC"). *See* 26 U.S.C. § 411(d)(6).[6] Therefore, when interpreting Section 204(g) of ERISA, in addition to the statute's legislative history, we may also look for guidance to sources which interpret its IRC counterpart—Section 411(d)(6). *See, e.g., Hoover v. Cumberland, Md. Area Teamsters Pension Fund*, 756 F.2d 977, 981 (3d Cir.) (seeking guidance in interpreting ERISA Section 204(g) from an IRS Technical Information Release interpreting its IRC counterpart), *cert. denied*, 474 U.S. 845 (1985); *see also* 29 U.S.C. § 1202(c) (mandating that "[r]egulations prescribed by the Secretary of the Treasury under sections 410(a), 411, and 412 of [IRC] . . . shall also apply to [their counterparts in ERISA]"). We turn to an ex-

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S. Ct. 1310 (1991). Indeed, in their briefs, plaintiffs and defendants rely on external sources to support their respective constructions of Section 204(g).

[6] The reason that many ERISA sections have such counterparts in the IRC is that, to encourage employers to establish pension plans, Congress provides favorable tax treatment for plans which comply with ERISA's requirements. *See Plucinski v. I.A.M. Nat'l Pension Fund*, 875 F.2d 1052, 1058 (3d Cir. 1989) ("The ERISA statute provides tax benefits to employers who [establish an ERISA qualifying pension plan], in order to encourage broad participation."). *Compare* 26 U.S.C. § 414(1) (IRC), *with* 29 U.S.C. § 1058 (ERISA).

amination of sources interpreting Section 411(d)(6) of the IRC.

The Internal Revenue Service ("IRS") has issued a Revenue Ruling which discusses the Section 411(d)(6) requirements for an employer who terminates an early retirement plan. *See* Rev. Rul. 85-6. In Revenue Ruling 85-6, the IRS considered whether such an employer is required to "set-aside" funds to provide early retirement benefits for its employees who might meet the age and service requirements for early retirement eligibility *after* the date on which the plan is terminated. The IRS stated:

> A participant could, after the date of the proposed termination, satisfy the pretermination conditions necessary to receive [early retirement benefits]. Accordingly, the proposed termination eliminating this accrued retirement-type subsidy would result in the plan failing to satisfy . . . Section 411. Further, all liabilities will not be satisfied . . . if the value of this retirement-type subsidy is not provided with respect to a participant who, after the date of the proposed termination, satisfies the pretermination conditions necessary to receive such benefit. Until the liabilities for these benefits are satisfied, the employer may not recover any remaining funds as surplus resulting from actuarial error without disqualifying the plan.

Thus, the IRS takes the position that an employee can satisfy the eligibility requirements for early retirement benefits *after* the early retirement plan is terminated. For example, an employee could accumulate additional years of service if he continues to work for the employer after the plan is terminated. Therefore, when a plan terminates, an employer must provide funding for early retirement benefits if there is the possibility that its employees will "grow into" these benefits at a date after its early retirement plan is eliminated.

We give weight to IRS revenue rulings and do not disregard them unless they "conflict with the statute they purport to interpret of its legislative history, or if they are otherwise unreasonable." *Geisinger Health Plan v. Commissioner*, 985 F.2d 1210, 1216 (3d Cir. 1993). Revenue Ruling 85-6 is reasonable and is entirely consistent with Section 204(g) of ERISA and Section 411(d)(6) of the IRC. It is also consistent with the legislative history of the REA.[7]

Based on the statutes, the revenue ruling and the legislative history, we would conclude that if Hoechst had continued to employ plaintiffs after terminating its early retirement plan, plaintiffs would be able to qualify for early retirement benefits at a later date by meeting the plan's

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[7] Prior to the favorable vote on the REA, one of the bill's sponsors explained the legislative intent behind the section of the REA which amended Section 204(g) of ERISA as follows:

> [This section] contains an important change in current law having a far-reaching effect in eliminating currently perceived abuses occurring when overfunded pension plans are terminated and the excess assets revert to the employer. . . . [A] plan is not to be considered . . . to have satisfied all of its liabilities to participants and beneficiaries until it has provided for the payment of contingent liabilities with respect to a participant who, after the date of the termination of a plan, meets the requirements for a subsidized benefit. This change from present law means that for sufficient plans, depending on the circumstances, some or all of the plan assets that would otherwise revert to the employer will now have to be allocated to participant benefits. *By sharing in additional plan assets which otherwise would revert to the employer, employees nearing early retirement at plan termination who later meet the plan's early retirement conditions receive an immediate benefit . . . [of] increased retirement equity.*

130 Cong. Rec. H 8763 (daily ed. Aug. 9, 1984) (remarks of Representative Roukema, ranking minority member of House Subcommittee on Labor Management Relations) (emphasis added). This is some evidence that Congress intended for employees to be able to qualify for early retirement even after their employer had terminated their early retirement plan.

pretermination requirements. We conceive of no obvious reason why this same result should not obtain when the employees continue in their same jobs for a successor employer. However, defendants argue that a sale of assets *where the employees no longer continue to work for the plan sponsor* is materially different from a plan termination where the employees continue to work for the plan sponsor. In short, defendants argue that "[s]ince [plaintiffs] no longer work for the plan sponsor, they cannot subsequently qualify for, or 'grow into,' the right to [early retirement benefits]." (Defs.' Brief at 17).

In support of their argument, defendants quote the following passage from the legislative history of Section 301 of the REA:

> [Section 301] generally protects the accrual of benefits with respect to participants who have met the requirements for a benefit as of the time a plan is amended and participants who subsequently meet the preamendment requirements. The bill does not, however, prevent the reduction of a subsidy in the case of a participant who, at the time of separation from service (whether before or after the plan amendment), has not met the preamendment requirements.

S. Rep. No. 575, 98th Cong., 2d Sess. 28 (1984), *reprinted in,* 1984 U.S.C.C.A.N. 2547, 2574. Defendants argue that plaintiffs were "separated from service" on the effective date of the sale of the PVC Division and, therefore, they can never accumulate the additional years of service which they would need to qualify for early retirement benefits under the Hoechst Retirement Plan.

Initially, we note that the "separated from service" language does not expressly appear in Section 204(g) of ERISA, nor does it appear in Section 411(d)(6) of the IRC. However, in interpreting neighboring sections of the IRC, the IRS has consistently taken the position that

> an employee will be considered separated from service . . . only upon the employee's death, retirement, resignation, or discharge, and not when the employee continues in the same job for a different employer as a result of liquidation, merger, consolidation, etc. of the former employer.

Rev. Rul. 79-336 (interpreting "separated from service" under IRC section 402); *see* Rev. Rul. 89-129 (same); Priv. Ltr. Rul. 86-14-048 (Jan. 9, 1986) ("[W]henever an employee follows the transfer of assets of a business to a new employer, no matter what the form takes, there is no separation from service unless the employee either immediately takes on new responsibilities at the new employer or actually separates from service by going to work for an unrelated business."); Gen. Couns. Mem. 39,384 (Jul. 18, 1985) (concluding that "separation from service" under IRC section 409 should be interpreted in the same way as that phrase is interpreted under IRC section 402).

At least one court has relied upon these IRS sources in concluding that employees who continue to work in their same jobs for a successor employer do not undergo a separation from service for the purpose of eligibility for early retirement benefits. *See Hollingshead v. Burford Equip. Co.*, 809 F. Supp. 906, 917-18 (M.D. Ala. 1992). The relevant facts in *Hollingshead* are virtually identical to the facts before this court. The first employer sold certain assets, including a manufacturing facility to a successor employer. The plaintiffs in *Hollingshead* continued to work in their same positions for the successor employer. *Id.* at 916. They argued that, under Section 204(g) of ERISA, they should be able to become eligible for early retirement under the first employer's plan "even though they did not qualify for early retirement at the time the sale of assets occurred." *Id.*

Just as in this case, the first employer in *Hollingshead* argued that its liability ended with the asset sale and that

it had no liability to anyone who had not met the requirements for early retirement at the time of the sale. *Id.* However, the *Hollingshead* court concluded that the plaintiffs had not undergone a separation from service with the first employer. *Id.* at 917-18. Rather, it concluded that "employees [of the first employer] who continue to work for [the successor employer] in the same job are allowed to 'grow into' their early retirement pension benefit while working for [the successor employer]." *Id.* at 918.

We agree with the reasoning of the *Hollingshead* court that an employee is not separated from service if the employee continues on in the same job for a successor employer. There is no dispute that plaintiffs continued in their same jobs for American Mirrex. Thus, we conclude that plaintiffs were not separated from service and they can continue to accumulate years of service while working for American Mirrex—the successor employer. Our conclusion is supported by the statutes, the IRS rulings and the legislative history of the REA. Our conclusion is also consistent with the IRS regulations that implement Section 411(d)(6). *See* 26 C.F.R. 1.411(d)-4 (Q&A 3) (1992) ("Section 411(d)(6) protected benefits may not be eliminated by reason of transfer or any transaction amending or having the effect of amending a plan or plans to transfer benefits."). In addition, our conclusion is consonant with the position taken by the IRS in at least one private letter ruling. *See* Priv. Let. Rul. 91-420-27 (Oct. 18, 1991) (rejecting argument that if "'[n]one of the employees . . . had 30 years of benefit service" then, "[i]n calculating the amount to be transferred . . . the fully subsidized early retirement benefit after 30 years of benefit service does not have to be considered, because the employees . . . will not be able to earn any further years of benefit service [after going to work for the successor employer]").

We reject defendants' argument that our conclusion conflicts with two of this court's earlier decisions. *See*

Berger v. Edgewater Steel Co., 911 F.2d 911 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1310 (1991); *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279 (3d Cir. 1988). *Berger* is easily distinguishable because all of the plaintiffs in that case had left their employment before meeting the requirements for early retirement. 911 F.2d at 915. Accordingly, there was a separation from service and no possibility that the employees would later meet the eligibility requirements for early retirement benefits. *Hlinka* is also distinguishable because that decision did not involve the application of Section 204(g) of ERISA. 863 F.2d at 284 n.10.

We also recognize that two district courts interpreting Section 204(g) have reached a contrary conclusion. *See Berard v. Royal Elec., Inc.*, 795 F. Supp. 519 (D.R.I. 1992); *Lear Siegler Aerospace Prods. Holding Corp. v. Smiths Indus., Inc.*, No. 88 Civ. 1528, 1990 WL 422417 (S.D.N.Y. 1990).[8] However, we find the reasoning employed by those courts unpersuasive. The *Lear Siegler* court quoted the same "separation from service" language that we discuss above. 1990 WL 422417, at *12. However, it then implicitly concluded that an employee is separated from service when the facility where the employee works is sold to a new employer and the employee no longer works for the plan sponsor. *Id.* at *12-14. The *Berard* court adopted the reasoning of the *Lear Siegler* court with little analysis of its own. As discussed above, we reject that reasoning.

We realize that, under ERISA, defendants can transfer their liability for early retirement benefits to the American Mirrex Retirement Plan. *See* 29 U.S.C. § 1058. However, to transfer their liability for early retirement

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[8] Although two courts of appeals have also considered this issue after the enactment of Section 204(g), their opinions do not address the application of that section. *See Fuller v. FMC Corp.*, Nos. 92-1738 & 92-2248. 1993 WL 280762, at *6 (4th Cir. July 28, 1993); *Awbrey v. Pennzoil Co.*, 961 F.2d 928, 932 (10th Cir. 1992).

benefits, defendants must transfer sufficient assets to the American Mirrex Retirement Plan to fund those benefits. *See* 29 U.S.C. § 1344(a)(6). We note that defendants contend that "the amount of funds transferred [to the American Mirrex Retirement Plan] was calculated to include the liability related to the 'Rule of 85' early retirement benefit." (Defs' Brief at 14). However, as the district court correctly noted, whether defendants transferred sufficient assets to the American Mirrex Retirement Plan to fund the early retirement benefits is a disputed factual issue. *See Gillis v. Hoechst Celanese Corp.*, 818 F. Supp. 805, 810 (E.D. Pa. 1992). The consequence of the resolution of this disputed factual issue is a matter for the district court in the first instance.

In sum, we conclude that plaintiffs were not separated from service and, thus, they can continue to accumulate years of service while working for American Mirrex—the successor employer—to be counted towards qualifying for early retirement benefits. Accordingly, we will vacate that portion of the district court's order which granted summary judgment for defendants on this claim.

The district court refused to certify plaintiffs as class representatives on this claim based largely on its interpretation of Section 204(g) of ERISA. Because we have rejected that interpretation, we will also vacate the district court's order to the extent that it denies class certification and will remand that issue for reconsideration.

3. Reporting and Disclosure Violations

Plaintiffs allege that defendants failed to comply with ERISA's reporting and disclosure requirements with respect to the Hoechst Retirement Plan and the Hoechst Celanese Separation Pay Policy. Plaintiffs sought an injunction ordering defendants to comply with these requirements and they also asked the district court to impose civil penalties against defendants. The district court assumed, without deciding, that defendants violated the

reporting and disclosure requirements, but declined to grant the requested relief because it concluded that plaintiffs had not been harmed by any such nondisclosure. We turn to a review of the district court's conclusion.

Under ERISA, "[t]he [plan] administrator shall, upon written request of any participant or beneficiary, furnish a copy of [certain plan documents]." 29 U.S.C. § 1024 (b)(4). We see no statutory support for the district court's apparent conclusion that a plan participant must demonstrate harm in order to obtain an injunction requiring the plan administrator to comply with this disclosure provision. Our conclusion that harm need not be shown is supported by the Supreme Court's statement that "Congress' purpose in enacting the ERISA disclosure provisions [was to] ensur[e] that 'the individual participant knows exactly where he stands with respect to the plan.' " *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 118 (1989) (quoting H. R. Rep. No. 93-533, 93rd Cong., 1st Sess. 11 (1973)). Thus, we conclude that ERISA does not require that harm be shown before a plan participant is entitled to an injunction ordering the plan administrator to comply with ERISA's reporting and disclosure requirements. To the extent that the district court may have believed otherwise we conclude that it erred. Accordingly, we cannot affirm the district court's grant of summary judgment on the reporting and disclosure claim on this basis.

As we stated earlier, the district court assumed, without deciding, that plaintiffs had standing to bring this claim and that defendants were guilty of reporting and disclosure violations. If, on remand, the district court decides these issues in plaintiffs' favor, it should then issue an injunction requiring the plan administrator to comply with ERISA's reporting and disclosure requirements. Whether the district court awards plaintiffs any monetary damages is a matter of discretion. *See* 29 U.S.C. § 1132 (c)(1). We flatly reject plaintiffs' argument that "[t]he $100-per-day penalty of 29 U.S.C. § 1132(c)(1) ***must***

be imposed for failure to produce documents on request." (Pls.' Brief at 45) (emphasis added).

The district court also denied plaintiffs' request for class certification on this claim. However, at the time it denied the request for class certification, the court may have assumed that plaintiffs had no claim to benefits under the Hoechst Retirement Plan. Because, in light of our holding on the early retirement claim, such an assumption may be incorrect we will also vacate the portion of the district court's order which denied class certification and remand that issue for reconsideration.

4. Seniority Claim

Plaintiff Gillis contended that, under ERISA, his seniority should be adjusted to include his two years of service at a plant in Canada owned by Hoechst. We think that in granting summary judgment for Hoechst the district court necessarily denied this claim.[9] However, the district court's opinion did not explain the basis for its decision in this regard. Thus, "the reason for summary judgment is [not] apparent on the record." *Vadino v. A. Valey Eng'rs,* 903 F.2d 253, 258 (3d Cir. 1990). We are unable to determine whether the district court denied this claim because it concluded that it was waived or whether it denied the claim for reasons related to its merits. Accordingly, we lack "a reasoned basis on which to found our review." *Id.* In this case, our difficulty in reviewing the district court's decision was not alleviated by the briefing and oral argument on this appeal. *Cf. id.* at 259. Therefore, we will vacate the district court's order to the extent that it denies this claim and remand the claim so that the basis for the decision can be explicated by the district court and an appropriate order can be entered.

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[9] In its order entered on September 28, 1992, the district court stated: "The motion for summary judgment of defendants . . . is granted." We conclude that this argument of summary judgment included the denial of this claim. *See supra* note 1.

B. Claims Disposed of By Dismissal

The district court certified plaintiffs as class representatives for their state law vacation pay claim. However, the district court subsequently dismissed the vacation claim after reasoning: "[B]ecause there is no longer a viable federal claim, there is no longer subject matter jurisdiction, and I must dismiss this matter." *Gillis v. Hoechst Celanese Corp.*, 818 F. Supp. 805, 811 (E.D. Pa. 1992). The district court applied this same reasoning when it dismissed Plaintiff Sargeni's state law claim that Hoechst breached a contractual obligation to provide him with counseling concerning his benefit options at the time it sold the PVC Division.

We express no opinion on whether the district court was correct in its legal analysis on this issue. Because we have reversed the district court's order to the extent that it grants summary judgment on the early retirement claim, the reporting and disclosure claim and the seniority claim, there are now viable federal claims. Accordingly, we will reverse the district court's order to the extent that it dismisses these two claims on that ground.

III. CONCLUSION

The order of the district court will be vacated to the extent that it grants summary judgment for defendants on the early retirement benefits funding claim and the reporting and disclosure claim and to the extent that it denies class certification on those claims. The order of the district court will also be vacated to the extent that it grants summary judgment for Hoechst on the seniority claim. In addition, the order of the district court will also be vacated to the extent that it dismisses the vacation pay claim and the breach of contract claim based on lack of subject matter jurisdiction. The remainder of the district court's order will be affirmed.

ALITO, *Circuit Judge*, concurring:

I join the opinion of the court, but I write separately to highlight my understanding of the question concerning early retirement benefits that is before us and the reasons why the district court's decision with respect to this question was incorrect.

The plaintiffs acknowledge that their current employer's retirement plan (the American Mirrex Retirement Plan) states that they are to receive the same early retirement benefits subject to the same conditions as their previous plan (the Hoechst Celanese Retirement Plan). The plaintiffs argue, however, that Hoechst Celanese, in violation of Section 208 of ERISA, 29 U.S.C. § 1058, and Section 414(1) of the Internal Revenue Code, 26 U.S.C. § 414(1), failed, upon selling the division in which they worked, to transfer to the American Mirrex Plan sufficient assets to fund their early retirement benefits.

Section 208 of ERISA, 29 U.S.C. § 1058, states in pertinent part:

> A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan . . . unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had been terminated).

In a similar vein, Section 414(1) of the Internal Revenue Code, 26 U.S.C. § 414(1), provides that a plan is not "qualified" unless the same requirements are met. Thus, both provisions require us to compare (a) the benefits, if any, that the plaintiffs would have received if the Hoechst Celanese Plan had terminated just before the transfer of assets with (b) the benefits, if any, that the plaintiffs

would have received if the American Mirrex Plan had terminated just after the transfer.

In order to determine the benefits that the plaintiffs would have received upon termination of the plans at these two point in time, it is necessary to look to Section 4044 of ERISA, 29 U.S.C. § 1344, which prescribes the order in which the assets of a single-employer defined benefit plan are allocated among participants and beneficiaries at termination. The effect of all of these provisions—26 U.S.C. § 414(l) and 29 U.S.C. §§ 1058 and 1344—when read together was to require that any allocation of assets to the plaintiffs' early retirement benefits that would have occurred upon termination of the Hoechst Celanese Plan just before the transfer not exceed the allocation of assets to those benefits that would have occurred upon termination of the American Mirrex Plan just after the transfer.

In order to determine what allocation, if any, would have been made to the plaintiffs' early retirement benefits if the Hoechst Celanese Plan had terminated prior to the transfer of assets, we must consider Section 204(g) of ERISA, 29 U.S.C. § 1054(g), and its counterpart, Section 411(d)(6) of the Internal Revenue Code, 26 U.S.C. § 411(d)(6). Section 204(g) of ERISA prohibits any plan amendment that reduces the early retirement benefits of a participant who "satisfies (either before or after the amendment) the preamendment conditions for the subsidy." 29 U.S.C. § 1054(g)(2). Likewise, Section 411(d)(6) of the Internal Revenue Code states that a "qualified" plan must treat a participant's early retirement benefits in the same manner. As previously noted, Section 208 of ERISA and Section 414(l) of the Internal Revenue Code require us to hypothesize that the Hoechst Celanese Plan terminated just prior to the transfer of assets to the American Mirrex Plan. Consequently, if this hypothetical termination of the Hoechst Celanese Plan would have constituted an "amendment," Section 204(g) of ERISA and Section 411(d)(6) of the Internal Reve-

nue Code would have required that the plaintiffs be given the opportunity to "satisf[y] (either before or after the [termination]) the pre[termination] conditions for the subsidy."

While neither Section 204(g) of ERISA nor Section 404(l) of the Internal Revenue Code expressly states that a termination must be regarded as an amendment for these purposes, Revenue Ruling 85-6 has drawn this conclusion. This ruling concerned the proposed termination of an overfunded defined benefit plan that provided for excess assets (i.e., the value of the plan's assets less the present value of the participants' benefits on a termination basis) to revert to the employer as permitted by Section 4044(b) of ERISA, 29 U.S.C. § 1344(b). The ruling concluded that, upon termination of the plan, those employees who had not yet satisfied the age and years-of-service requirements for early retirement benefits could not be deprived of the right to satisfy those conditions after the date of termination. The ruling further reasoned that those prospective benefits had to be funded by some means before any residual assets could revert to the employer.

For the reasons stated in the opinion of the court, I believe that Rev. Rul. 85-6 should be heeded. It follows that, if the Hoechst Celanese Plan had terminated just before the transfer, the plaintiffs would have retained the right to qualify for early retirement benefits after the termination and that assets would have had to have been allocated to these prospective benefits. Consequently, in order to comply with Section 208 of ERISA and Section 414(l) of the Internal Revenue Code, Hoechst Celanese was required to transfer sufficient assets to the American Mirrex Plan to ensure that at least an equal allocation would occur if the latter plan terminated just after the transfer. Since there is a factual dispute as to whether the defendants in this case transferred sufficient assets to meet this requirement, summary judgment for the defendants was inappropriate.

STAPLETON, J., *Concurring and Dissenting*:

As the court's opinion recognizes, under § 1058 of ERISA, defendants can transfer their liability for early retirement benefits to the American Mirrex Retirement Plan and they have purported to do so. The only issue separating the parties is whether defendants have transferred sufficient assets to that plan to satisfy § 1058. Unlike my colleagues, I conclude that they have.

Section 1058 provides that a plan "may not . . . transfer its assets or liabilities to any other plan . . . unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the . . . transfer which is equal to or greater than the benefit he would be entitled to receive immediately before the . . . transfer (if the plan had then terminated)." Thus the key to understanding the requirements of § 1058 is to focus first on what benefit the participants would receive if the plan were terminated immediately prior to the transfer. That benefit, and the funding required to pay the present value of the total of all such benefits, establishes the floor of permissibility for the transfer. If each participant would receive no lesser benefit on a termination immediately after the transfer, and the funding is available immediately after to pay an amount equal to the present value of the total of all such benefits, § 1058 is satisfied and the transfer is permissible. See 26 C.F.R. § 1.414(1)-1(e)(i).

In order to determine whether a plan participant who had not yet qualified for an early retirement benefit through giving the stipulated years of service to the employer would be entitled to receive something attributable to that benefit upon a termination immediately prior to the transfer, we must look to § 1344, the section that specifies the benefits which must be provided for on a termination. The cases decided prior to the Retirement Equity Act clearly hold that an early retirement benefit is

not an accrued benefit and that nothing need be provided on a termination with respect to someone who has not served the employer long enough to earn the early retirement benefit. *E.g., Ashenbaugh v. Crucible, Inc.*, 854 F.2d 1516, 1526 (3d Cir. 1988) (defining "accrued benefit" to exclude an early retirement benefit). The issue remains, however, whether the REA reversed this holding. I conclude that it did not.

Section 1054(g) provides in relevant part:

> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan. . . .
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> (2) For purposes of paragraph (1), a plan amendment which has the effect of—
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> (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
>
> (B) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy.

It is my understanding that the early retirement benefit here at issue is retirement type subsidy and, accordingly, that it is an accrued benefit that cannot be reduced if the relevant participant can meet the conditions for the subsidy before or after an amendment. When § 1054(g) and § 1344 are read together, one finds that where a participant has qualified for an early retirement benefit prior to a termination or may thereafter qualify for that benefit by aging and giving additional service to the plan sponsor,

the present value of the benefit has to be paid or set aside on termination. On the other hand, where, at the time of termination, a participant has not qualified for such a benefit and will not be able to do so in the future because the opportunity to give service to the plan sponsor will not exist, nothing need be paid or set aside on termination with respect to the early retirement benefit. Thus, if a plan sponsor terminates a plan in the course of a liquidation of its business in bankruptcy, for example, it need pay nothing to a participant who has not given the sponsor sufficient service to qualify for an early retirement benefit. As I understand the plaintiffs to concede, this is the effect of our decision in *Berger v. Edgewater Steel Corp.*, 911 F.2d 911 (3d Cir. 1990).

The case before us is not materially different from the above liquidation hypothetical. Instead of liquidating and terminating its plan in connection with selling all of its assets to a third party or parties, Hoechst, in the hypothetical posed by § 1058, is terminating a portion of its plan in connection with selling the assets of one of its businesses to a third party. The employees with respect to whom the plan is being terminated are going to work for the third party and will never render the service to Hoechst that it bargained for when it created the early retirement benefit. As a result, no early retirement benefit would be payable to the plaintiffs upon a termination immediately prior to the transfer, and it is immaterial if the funds available after the transfer are insufficient to fund early retirement benefits for plaintiffs under the Hoechst plan.

As the court's opinion acknowledges, the *Royal Electric* and *Lear Seigler* cases concur in my analysis. I acknowledge that the *Hollingshead* case does not. In the final analysis, I differ from my colleagues and the *Hollingshead* court because I find no help in Rev. Rul. 79-336 and Rev. Rul. 80-129 when it comes to determining whether, for purposes of § 1054(g)(2) a participant

who has not, and will not in the future, give sufficient years of service to the plan sponsor to qualify for an early retirement benefit is a "participant who satisfies the conditions" of that benefit. Section 1054(g)(2) does not use the phrase "at the time of separation from service" and the referenced Revenue Rulings have nothing to do with the subject matter of § 1054(g)(2) or its companion section of the IRC, § 411.[1] Sections 1054, 1058 and 1344 do, for me, clearly dictate that, in the context of termination, an early retirement benefit of the kind here involved is not accrued and need not be provided for with respect to any participant who will never be able to satisfy a minimum service to the sponsor requirement.

I agree with and join the opinion of the court in all other respects.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals
for the Third Circuit

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[1] My understanding of the application of §§ 1054, 1058 and 1344 in circumstances of this kind is, of course, consistent Rev. Rul. 85-6 which does construe § 411.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 90-5542

LEONARD GILLIS and VALDO A. SARGENI, on behalf of themselves and all others similarly situated

v.

HOECHST CELANESE CORPORATION and
HOECHST CELANESE RETIREMENT PLAN

MEMORANDUM AND ORDER

[Filed Sep. 25, 1992]

DITTER, J. — September 24, 1992

In this case, employees claim they lost benefits when the plant where they worked was sold to another company. Plaintiffs, Leonard Gillis and Valdo A. Sargeni, are asserting claims against Hoechst-Celanese Corporation and the Hoechst-Celanese Retirement Plan under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1371, and the Delaware Wage Payment and Collection Act, Del. Code Ann. tit. 19, §§ 1101-1115. The parties submitted cross motions for summary judgment. Also pending is the plaintiffs' motion for reconsideration of my March 31, 1992, decision concerning an early retirement issue.

Having considered the briefs, I will grant the defendants' motion for summary judgment, deny the plaintiffs'

motion for summary judgment, deny the motion for reconsideration, and order judgment in favor of the defendants and against the plaintiffs.

On February 27, 1987, the American Hoechst Corporation merged with the Celanese Corporation. In May, 1989, Hoechst Celanese sold its Delaware City PVC division to the American Mirrex Corporation. Mr. Gillis and Mr. Sargeni were originally salaried employees of American Hoechst, became Hoechst-Celanese salaried employees because of the merger, and then became American Mirrex salaried employees when that company bought the PVC division.

Despite the sale, Mr. Gillis, Mr. Sargeni, and the other PVC division employees continued to work at the Delaware City facility, albeit for the new employer. They kept the same jobs and did not lose any working days.

In connection with its purchase of the PVC division, American Mirrex agreed to provide substantially the same employee benefits as those of Hoechst-Celanese. Mr. Gillis and Mr. Sargeni claim, however, that they have lost severance pay, certain early retirement benefits, and vacation pay. Mr. Gillis and Mr. Sargeni seek a declaration that they deserve these benefits, appropriate funding for them, and penalties for various reporting and disclosure violations under ERISA.

In an order dated March 31, 1992, I certified Mr. Gillis and Mr. Sargeni as class representatives for the severance and vacation pay claims. In these matters, Mr. Gillis and Mr. Sargeni represent themselves and other former Hoechst-Celanese employees who now work for American Mirrex in the Delaware City PVC division. On the final two issues, the reporting violations and early retirement claims, Mr. Gillis and Mr. Sargeni are proceeding for themselves only.

To prevail on summary judgment, a party must show there are no genuine issues of material fact and that it is

entitled to judgment as a matter of law, even after all of the evidence is interpreted in a way most favorable to the other party. To show there are no genuine issues, a party must show that no reasonable fact-finder, after considering all of the evidence presented, could find for the other party.

I. The Severance Claim.

Mr. Gillis, Mr. Sargeni, and the class members claim they deserve severance benefits because their employment with Hoechst-Celanese ceased after the PVC plant sale. Hoechst-Celanese agrees it no longer employs the plaintiffs, but it maintains they are not entitled to severance benefits. Hoechst-Celanese claims the plain language in the company's severance plan does not provide severance payments to employees when a company acquires their division and continues to employ them. On this basis, the Hoechst-Celanese human resources department denied the plaintiffs' request for severance benefits.

The Hoechst-Celanese severance plan applied to Mr. Gillis, Mr. Sargeni, and the other class members when Hoechst-Celanese sold the Delaware City PVC plant to American Mi-rex. The plan explicitly gave the human resources department the right to interpret the plan and set up a standard of review for these decisions. Section 6 reads:

> The Corporate Human Resources Department is responsible for administering this policy, issuing procedures and local guidelines, and handling any questions of policy interpretation, as well as determining the rights of any person to benefits under this policy. The decisions of the Corporate Human Resources Department shall be binding unless arbitrary or capricious.

For this reason, I must accept the human resources department's denial of severance benefits unless it was

arbitrary or capricious. *See Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 119 (3d Cir. 1990). The appropriate question is therefore whether the evidence shows the denial was clear error or not rational. *See Shiffler v. Equitable Life Assur. Soc.*, 838 F.2d 78, 83 (3d Cir. 1988). In this case, Hoechst-Celanese's severance decision must stand.

1. The severance plan.

After the merger, on January 1, 1989, Hoechst-Celanese adopted a severance policy. Paragraph 2.2 of Hoechst-Celanese's "Separation Pay Policy for Salaried Employees" provides:

> All regular, full-time salaried employees who are terminated by reason of
>
> —death
>
> —disability
>
> —retirement
>
> —gross misconduct
>
> —*sale of all or part of a business (where the acquiring or purchasing company offers continuing employment)*
>
> —failure to return to work following furlough or leave of absence
>
> —any other reason not specified in 2.1
>
> are *ineligible* for separation pay. (emphasis added).

On July 19, 1991, Mr. Sargeni testified that Hoechst-Celanese had distributed copies of the severance plans and updates to each employee over the years. He also said the human relations department made the documents available to interested employees and employees who needed access to them.

In addition, when it sold the PVC division to American Mirrex, Hoechst-Celanese held a series of meetings

to inform its employees about the transaction. Hoechst-Celanese distributed a transcript of these meetings to Mr. Sargeni, Mr. Gillis, and the other employees on January 20, 1989, and also posted copies on Company bulletin boards. One question directly addressed the severance issue, and the company representative's answer was consistent with the Hoechst-Celanese severance policy.

> Will there be a severance package if the new owner does not want to take me over?
>
> Yes. If you are *not* taken over at the time of the purchase and if we do not have a job for you within [Hoechst-Celanese], you will receive a severance package.

Furthermore, Mr. Gillis testified he received a copy of the severance plan from the benefits director at the PVC plant after the sale.

Under the circumstances, the uncontested evidence shows the class members were not entitled to severance pay. The plan's written severance provisions were clear, and Hoechst-Celanese communicated them to the employees both formally and informally. Since American Mirrex continued the PVC workers' employment without interruption, the plan did not provide severance benefits. Hoechst-Celanese's human resources department acted in accordance with the relevant provisions, and therefore I must uphold its decision.[1]

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[1] In fact, the only other plan that conceivably could apply to the Hoechst-Celanese PVC division employees, the American Hoechst severance plan, would not have provided severance either. The American Hoechst plan covered the PVC employees before the merger, but it also did not provide severance to "employees who are terminated by reason of sale of all or part of a business where the acquiring or purchasing company offers continued employment."

2. *The plaintiffs respond.*

Mr. Gillis and Mr. Sargeni present a number of documents and situations to argue Hoechst Celanese has provided severance to employees in similar circumstances and is therefore obligated to provide severance benefits here. None of these instances or materials shows a truly similar circumstance, though, and accordingly, none forestalls summary judgment.

First, Mr. Gillis and Mr. Sargeni point to the Hoechst-Celanese VALUES program. They claim the VALUES program was the company's attempt to communicate its benefits policy to its employees and, in conjunction with certain brochures, constituted a benefits plan which would grant severance pay here. A brief look at the program and the brochures demonstrates why Mr. Gillis and Mr. Sargeni cannot prevail on this point.

Hoechst-Celanese instituted the VALUES program in February, 1988, to articulate a series of guiding principles for the newly formed company's operations. The *Hoechst Celanese Update* for that month contained a speech from a Hoechst-Celanese board member that described the program this way:

> [The institution of the Values program] is our chance to create the fundamental Values of our new company, to buy into them, and, most important, to begin implementing them throughout the corporation. We have the opportunity to establish a clear vision of the future of Hoechst Celanese.
>
> Over the next few days, we will establish Values that everyone in the corporation can identify with; Values that will provide a basis for a true merger of American Hoechst and Celanese into a true entity; Values that will lay the foundation for Hoechst Celanese leadership—in the workplace, in the market place, and on the bottom line.

Recently, the Third Circuit held a company did not amend its ERISA benefits schedule, or "summary plan," [2] by distributing a brochure which presented an overview of company benefits. *See Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310 (3d Cir. 1990). The court reasoned the brochures explicitly mentioned the actual summary plan, did not contain information that section 1022(b) of ERISA requires in a summary plan, and were perfunctory compared to the summary plan documents.

Gridley applies here.

At the outset, many of the brochures the plaintiffs identify as constituting a summary plan explicitly say: "This booklet summarizes certain plan documents. If there is a difference between the booklet and the documents, the documents will govern." In *Gridley*, a similar phrase led the court to conclude: "In light of this language, the drafter or drafters could not have thought, and a reasonable reader could not have concluded, that the new overview brochure itself was a summary plan description." *Id.* at 1316.

In addition, like the *Gridley* documents, the Hoechst-Celanese brochures and VALUES documents were brief and unspecific compared to the plan documents the plaintiffs already had. The VALUES materials also did not contain information required under section 1022(b).

More fundamentally, though, as the board member's speech and other materials in the *Hoechst Celanese Update* made patently clear, Hoechst-Celanese began the VALUES program to set out the company's general guiding principles. In *Gridley* general brochures that addressed specific benefits were not a summary plan. By the same logic, the VALUES documents (even in con-

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[2] "Summary plan" is ERISA's term for a description of employee benefits. ERISA provides specific instructions about what information must appear in a summary plan.

junction with the brochures) cannot be a summary plan, and could not create an obligation to provide severance benefits.

Second, Mr. Gillis and Mr. Sargeni point to the February 20, 1987, amendment to the merger agreement between American Hoechst and Celanese Corp. They claim this document entitles them to severance payments, but the unambiguous language reads otherwise. In a provision similar to the Hoechst-Celanese severance policy, the merger agreement precludes severance payments when there is a "sale of all or part of a business, whether at one or more plant locations, where the acquiring company offers the affected employees continued employment and those employees accept such continued employment." In addition, even if it did provide for a severance payment, the merger agreement expired on February 27, 1989, about seven months before Hoechst-Celanese sold the PVC division to American Mirrex.

Third, Mr. Gillis and Mr. Sargeni claim American Hoechst provided severance benefits to employees at its Spartenburg and Greer, South Carolina facilities, and therefore must provide comparable benefits here. The uncontested testimony[3] reveals, however, that American Hoechst did not sell the Spartenburg plant. American Hoechst laid off the Spartenburg workers as part of a reduction in force. The Greer facility was sold, but it was a Celanese plant and the sale occurred in 1978 or 1979, approximately ten years before the Hoechst-Celanese merger. As a result, the severance benefits delivered to the Greer employees would not affect the plaintiffs, who were never Celanese employees.

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[3] This testimony includes admissions by both of the plaintiffs, Ronald K. Silversten (vice president and associate general counsel of Hoechst-Celanese), and Richard A. Carroll (director of corporate benefits for Hoechst-Celanese).

Fourth, Mr. Gillis and Mr. Sargeni identify a letter distributed in conjunction with the merger of Hoechst Canada and Celanese Canada. Aside from the fact that this letter addressed Canadian workers and companies, it provides severance benefits only to employees who "may be terminated." In this way, the letter does not conflict with the Hoechst-Celanese severance policy and cannot change it. Fifth, the plaintiffs rely on a Hoechst-Celanese filing with the SEC, but that document only discussed severance pay for terminated Celanese employees. The plaintiffs were not terminated and were never Celanese employees.

Finally, Mr. Gillis and Mr. Sargeni identify two employees who received severance benefits before leaving and without having a job. Again, though, because these workers were not continuing with the acquiring company, they would not be barred from severance under the Hoechst Celanese policy.

3. Equitable estoppel.

Just as they cannot show Hoechst-Celanese created a de facto amendment to the plan, the plaintiffs also cannot prevail on any kind of equitable estoppel claim. First, *Gridley* would require them to show they were victims of "extraordinary circumstances." *See Gridley*, 924 F.2d at 1319. In this case, where all of the plaintiffs kept their jobs and never lost a day of work, it would be impossible to conclude they experienced "extraordinary circumstances" by not receiving severance pay.

Moreover, the plaintiffs' testimony clearly shows they could not satisfy the reliance element of an equitable estoppel claim. Both plaintiffs admitted that, from the time they knew about the sale to the time of the sale, they never figured out what their severance benefits would be and did not spend any money or change their positions in anticipation of receiving the payments.

4. The severance claim must fail.

Because the clear terms of the Hoechst-Celanese severance plan do not provide severance benefits to Mr. Gillis, Mr. Sargeni, or the other class members, the decision to deny their severance claim could not have been arbitrary or capricious. In addition, Mr. Gillis and Mr. Sargeni have not identified documents or behavior that could demonstrate a de facto change in Hoechst-Celenese's severance benefits policy. Moreover, Mr. Gillis, Mr. Sargeni, and the other class members could not prevail on an equitable estoppel claim. For these reasons, I must enter summary judgment in favor of the defendants on the plaintiffs' severance benefits claim.

III. The Early Retirement Benefits.

Under the Hoechst-Celanese Retirement Plan, employees whose age and years of service with the company added to 85 were eligible for early retirement with full benefits. This program was commonly referred to as the Rule of 85 program. Mr. Gillis and Mr. Sargeni claim Hoechst-Celanese failed to fund the Rule of 85 program when it sold the PVC division to American Mirrex. On this claim, the men represent only themselves.[4]

Both sides now agree American Mirrex has preserved the Rule of 85 benefit for any former PVC division employees of Hoechst-Celanese. The American Mirrex plan provides:

> If you are a Transferred Employee and are entitled to early retirement benefits, the amount of your pension will not be less than would be determined under the early retirement provisions of the Hoechst Celanese Retirement Plan as in effect on the day before the effective date of the current plan.

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[4] Mr. Gillis and Mr. Sargeni have conceded on their claim for the $300/month early retirement supplement.

As a result of this agreement, Mr. Gillis and Mr. Sargeni argue the issue in this claim is now whether Hoechst-Celanese actually transferred enough money to fund their Rule of 85 benefits fully. This factual issue is clearly disputed, but it does not affect the outcome of the case.[6]

In my March 31, 1992, order, I discussed how *Berger v. Edgewater Steel Co.*, 911 F.2d 911 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1310 (1990), barred this claim. I noted that section 204(g)(1) of ERISA only prohibits employers from reducing employees' accrued benefits, and that under *Berger*, early retirement programs like the Rule of 85 were not accrued benefits. I therefore held Hoechst-Celanese did not violate ERISA by reducing or eliminating the Rule of 85 program for any employee who had not already satisfied the program's age and service requirements.

For this reason, even if Hoechst-Celanese did not transfer enough money to fund the Rule of 85 program for Mr. Gillis and Mr. Sargeni, the men have no recourse because they have no right to the Rule of 85 benefit. I must grant summary judgment in favor of the defendants on this claim.

III. The Reporting and Disclosure Violations.

Mr. Gillis and Mr. Sargeni also claim Hoechst-Celanese failed to satisfy ERISA's reporting and disclosure requirements. They seek an injunction ordering the defendants to produce various materials, and they seek relief under 29 U.S.C. § 1132(c). Section 1132(c) provides:

> Any administrator who fails or refuses to comply with a request for any information which such administrator is required . . . to furnish to a participant

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[6] This is the same argument the plaintiffs made in their motion for reconsideration of my March 31, 1992, order. I will deny that for the reasons that follow.

> . . . within 30 days after such request may in the court's discretion be personally liable to such participant . . . in the amount of up to $100 a day from the date of such failure or refusal.

Assuming the defendants have withheld information and that Mr. Gillis, Mr. Sargeni, and the class have standing to bring this claim, the undisputed testimony shows they suffered no harm. *See First Atlantic Leasing Corp. v. Tracey,* 738 F. Supp. 863, 876 (D.N.J. 1990).

Mr. Sargeni described how the Hoechst-Celanese human resources department regularly provided documents containing benefits information and was willing to provide duplicates. Mr. Gillis and Mr. Sargeni also both testified they and the class members did not read the materials very carefully. In fact, they admitted most employees did not read them at all unless they were reviewing them for a particular purpose. Additionally, both plaintiffs' testimony indicates they and the other class members relied heavily on the company's oral presentations at meetings which were admittedly thorough and well attended. The plaintiffs have also testified the human resources personnel were generally forthright and accessible with regard to benefits issues. Finally, the plaintiffs have not shown they lost any benefits.

Under these circumstances, where the plaintiffs did not seek benefits materials, did not carefully read the regular distributions they received, relied heavily on the company to communicate benefits information through meetings and other verbal presentations, and most importantly, have not shown Hoechst-Celanese improperly denied them any benefits under ERISA, they have suffered no harm and there can be no reason to award relief under Section 1132(c). I must grant summary judgment on this claim.

IV. The Delaware Wage Claims.

Because I must grant summary judgment on each of the federal claims, there is no longer subject matter jurisdiction to consider the plaintiffs' state law claims.

V. Conclusion

Mr. Gillis, Mr. Sargeni, and the class members are not entitled to severance benefits under the Hoechst-Celanese severance plan's clear provisions. They have also failed to show Hoechst-Celanese created a de facto amendment to the severance plan, or they could prevail on a theory of equitable estoppel. For these reasons, I must enter summary judgment on the severance claim.

I must also enter summary judgment in favor of the defendants and against Mr. Gillis and Mr. Sargeni on their early retirement benefits claim because the Rule of 85 was not an accrued benefit. Further, Mr. Gillis, Mr. Sargeni, and the class members cannot prevail on their reporting and disclosure claim because they suffered no harm. Finally, because there is no longer a viable federal claim, there is no longer subject matter jurisdiction, and I must dismiss this matter.

An order follows.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 90-5542

LEONARD GILLIS and VALDO A. SARGENI, on behalf of themselves and all others similarly situated

v.

HOECHST CELANESE CORPORATION and
HOECHST CELANESE RETIREMENT PLAN

ORDER

AND NOW, this 24th day of September, 1992, it is hereby ordered that:

1. The motion for summary judgment of plaintiffs, Leonard Gillis and Valdo A. Sargeni, is denied.

2. The motion for summary judgment of defendants, Hoechst Celanese Corporation and Hoechst Celanese Retirement Plan, is granted.

3. Summary judgment is entered in favor of the defendants and against the class on the severance benefit claims.

4. Summary judgment is entered in favor of the defendants and against Mr. Gillis and Mr. Sargeni on the early retirement claims, and ERISA reporting and disclosure claims.

5. The plaintiffs' state law claim for vacation pay is dismissed for lack of subject matter jurisdiction.

BY THE COURT
/s/ J. William Ditter, Jr.
J.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1879

LEONARD GILLIS, for themselves and all others similarly situated, as a class; VALDO A. SARGENI, for themselves and all others similarly situated, as a class

v.

HOECHST CELANESE CORPORATION; HOECHST CELANESE RETIREMENT PLAN, a federal employee pension benefit plan and trust,

Third-party Plaintiffs

v.

AMERICAN MIRREX CORPORATION, A Delaware corporation; AMERICAN MIRREX RETIREMENT PLAN, a federal empolyee benefit plan and trust,

Third-party Defendants

LEONARD GILLIS and VALDO SARGENI, for themselves and all others similarly situated,

Appellants

SUR PETITION FOR REHEARING

Before: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and SEITZ, *Circuit Judges*

The petition for rehearing filed by appellants and the petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petitions for rehearing are denied. Judge Becker and Judge Stapleton would have granted appellees' petition for rehearing.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

Dated: Oct. 6, 1993

Supreme Court, U.S.
FILED
FEB 4 1994
OFFICE OF THE CLERK

No. 93-1081

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

LEONARD GILLIS, VALDO A. SARGENI,
for Themselves and All Others Similarly Situated,
Petitioners,

v.

HOECHST CELANESE CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether ERISA requires that a court overturn a plan administrator's application of a severance pay plan's clear exclusion of benefits where a company sold one of its divisions, the employees both were offered and retained their jobs with the purchasing employer and, prior to the sale, the employees were fully informed of the terms of the plan through informal means, but were not provided with a copy of the actual plan document.

LIST OF PARTIES

The parties in the court of appeals were Leonard A. Gillis and Valdo Sargeni, petitioners herein; Hoechst Celanese Corporation, respondent herein; and the Hoechst Celanese Retirement Plan. Messrs. Gillis and Sargeni brought their claims on behalf of a class of former employees of Hoechst Celanese Corporation.

Hoechst Celanese Corporation is a wholly-owned subsidiary of Hoechst Corporation and Hoechst A.G., a German corporation. Hoechst-Roussel Pharmaceuticals Inc. is a subsidiary of the Hoechst Celanese Corporation.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

No. 93-1081

LEONARD GILLIS, VALDO A. SARGENI,
for Themselves and All Others Similarly Situated,
Petitioners,

v.

HOECHST CELANESE CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's grant of summary judgment for respondent Hoechst Celanese Corporation ("Hoechst Celanese") on the issues raised in the petition for writ of certiorari is reported at 4 F.3d 1137 (3d Cir. 1993), and is reproduced in the appendix attached to the petition, "Pet. App." at 1a-31a. The district court's opinion, granting Hoechst Corporation summary judgment on that same issue, is reported at 818 F. Supp. 805 (E.D. Pa. 1992), and is reproduced in the petitioners' appendix, Pet. App. at 32a-44a. The court of appeals' order denying the parties' rehearing petitions is not reported, and is reproduced in the petitioners' appendix, Pet. App. at 46a-47a.

STATEMENT OF THE CASE

Petitioners, Leonard Gillis and Valdo A. Sargeni, are former salaried employees of the Delaware City, Delaware, PVC Division of Hoechst Celanese. In September 1989, Hoechst Celanese sold the Delaware City facility, where petitioners worked, to MX Holdings, Inc. and its nominee, American Mirrex Corporation ("American Mirrex"). Pursuant to the sale agreement, petitioners were offered the same jobs with American Mirrex, at the same location and at the same pay.

Hoechst Celanese is the product of a 1987 merger of the American Hoechst Corporation ("American Hoechst") and the Celanese Corporation ("Celanese"). The resulting entity became and remains a wholly-owned subsidiary of a German corporation, Hoechst A.G. Prior to the February 1987 American Hoechst/Celanese merger, petitioners were salaried employees of American Hoechst. In December 1986, petitioners were provided with a copy of the governing American Hoechst severance plan. That plan contained the following exclusion from coverage:

> Employees who are terminated by reason of death, disability, retirement, *sale of all or part of a business (where the acquiring or purchasing company offers continued employment), . . . shall not be considered eligible for separation pay.*

Following the American Hoechst/Celanese merger, Hoechst Celanese adopted a new severance plan, effective January 1, 1989, with almost identical language.[1] Paragraph 2.2 of the Hoechst Celanese Separation Pay Policy for Salaried Employees provides that "all regular, full-time salaried employees who are *terminated by reason of . . . sale of all or part of a business (where the*

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1. Contrary to petitioners' varied assertions, the record includes the undisputed testimony of Hoechst Celanese personnel authenticating the Hoechst Celanese severance plan in effect as of January 1, 1989.

acquiring or purchasing company offers continued employment) . . . are ineligible for separation pay."

At the time of the sale of the PVC Division, Hoechst Celanese conducted well-attended benefits meetings with its employees to explain, *inter alia,* the general inapplicability of the severance pay plan to employees because the sale of the PVC Division would result in continued employment. Denying petitioners' claims for severance benefits, Hoechst Celanese simply applied the longstanding exclusion clearly provided in the Plan applicable to sales of divisions where the purchaser offers continuing employment.

REASONS FOR DENYING THE PETITION

A.

There are no special or important reasons for granting review of this matter, as required by Rule 10 of this Court's Rules. The gravamen of petitioners' claim is that Hoechst Celanese's failure to distribute formally the severance plan document alone requires an award of severance benefits. ERISA includes a hierarchy of discretionary remedies and to adopt such a *per se* rule would require judicial rewriting of the clear legislative mandate. The lower courts properly considered the remedies possibly occasioned by the lack of formal distribution of a written copy of the plan and the district court has yet to consider whether equitable or other relief may be appropriate.[2]

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2. While an award of benefits stemming from a mere failure to distribute a plan document might be appropriate in other cases, the record here does not support that result. Since the distribution of the American Hoechst severance plan in 1986, petitioners knew of the governing limitation on severance pay coverage through a variety of informal means. The 1987 American Hoechst/Celanese Merger Agreement, upon which petitioners primarily rely, contains the identical exclusion.

This Court's opinion in *Mertens v. Hewitt Assoc.*, 113 S. Ct. 2063 (1993), disposes of the arguments advanced in the petition. Citing ERISA's "comprehensive and reticulated" nature, *Mertens* holds that ERISA does not permit claims for money damages against nonfiduciaries who knowingly participate in a fiduciary's alleged breach. This Court's reluctance to expand ERISA's remedies beyond Congressionally-contemplated boundaries underscores the correctness of the lower courts' refusal to create a *per se* entitlement to benefits and, in turn, provides more than sufficient grounds for denial of the petition.

ERISA Section 502(c)(1), 29 U.S.C. § 1132(c)(1), establishes discretionary remedies for a plan administrator's failure to furnish timely plan documents. Upon a failure to distribute requested plan documents, ERISA permits a court to assess a $100 per day penalty against a plan administrator and if needed, to fashion "other relief as it deems proper." *Id.*[3] The statute does not, however, require an award of benefits for failure to distribute timely a plan document.

Here, the court of appeals affirmed the district court's refusal to fashion the broader remedy petitioners seek while remanding the matter for consideration of

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3. ERISA section 502(c)(1) is reproduced in the appendix attached hereto, "Res. App." at A-1-2. Although not specifically pleaded in the complaint, the other possible section upon which petitioners could have sought relief is Section 502(a)(3), 29 U.S.C. § 1132(a)(3), which limits the available remedy to an injunction or "other appropriate equitable relief." *Id.* (Res. App. at A-1). Assuming petitioners' claims are also grounded in section 502(a)(3), there is no indication that Congress intended to allow otherwise unavailable compensatory damages in the guise of severance benefits. *Mertens*, 113 S. Ct. at 2069-70 ("Regarding equitable relief in § 502(a)(3) to mean 'all relief available for breach of trust available at common law' would also require us to give the term a different meaning there than it bears elsewhere in ERISA, or to deprive of all meaning the distinction Congress drew between 'equitable' and 'remedial relief' in § 409(a) . . . .").

whether an injunction requiring disclosure is appropriate and, further, whether any monetary sanction is warranted:

> If, on remand, the district court decides [certain standing] issues in plaintiffs' favor, it should then issue an injunction requiring the plan administrator to comply with ERISA's reporting and disclosure requirements. Whether the district court awards plaintiffs any monetary damages is a matter of discretion.

4 F.3d at 1148 (Pet. App. at 22a). To go further, as petitioners request, would interfere with ERISA's "six carefully integrated civil enforcement provisions." *Massachusetts Mut. Life Ins. Co. v. Russell,* 473 U.S. 134, 146 (1985).[4]

Additionally, and consistent with the discretionary remedial framework in section 502(c), the lower courts considered and rejected petitioners' request that Hoechst Celanese be equitably estopped from denying the benefits, citing a lack of proof that petitioners relied to their detriment on the expectancy of severance. 4 F.3d at 1142 (Pet. App. at 9a-10a).[5] Consistent with

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4. *See also Mertens,* 113 S. Ct. at 2070 ("The authority of courts to develop a 'federal common law' under ERISA . . . is not the authority to revise the text of the statute.").

5. As such, petitioners' characterization of the Third Circuit's ruling is inaccurate. According to petitioners:

> The Third Circuit in this case has taken the extreme view that the fact that a benefit policy was not made available to participants is "irrelevant in determining entitlement to benefits."

Petition at 14-15 (quoting *Gillis v. Hoechst Celanese Corp.,* 4 F.3d 1137, 1141 (3d Cir. 1993)). Petitioners overlook the fact that the lower courts analyzed their claims under equitable estoppel principles to determine whether equity required that Hoechst Celanese's failure to distribute the plan estopped it from denying benefits. *Gillis,* 4 F.3d at 1142 (Pet. App. at 9a-10a); *Gillis,* 818 F. Supp. at 810 (Pet. App. at 40a-41a). The possibility of being estopped from denying benefits, along with the $100 per day penalty provision of

Mertens, petitioners' claim to severance benefits has been properly analyzed under the explicit language of the statute.

B.

The other court of appeals' opinions addressing the failure to provide plan documents, on which petitioners rely, simply evidence the varied exercise of discretion authorized in ERISA section 502(c) and elsewhere, rather than a pertinent circuit conflict. In other words, ERISA permits courts to frame appropriate remedies to redress the variety (in type and degree) of possible alleged violations. The remaining opinions cited in the petition address issues not present in this litigation.

For example, in *Blau v. Del Monte Corp.,* 748 F.2d 1348 (9th Cir. 1984), *cert. denied,* 474 U.S. 865 (1985), an employer who "failed to comply with virtually every applicable mandate of ERISA," was not permitted to enforce the terms of a plan document intentionally kept secret from participants. *Id.* at 1353. The procedural violations in *Blau,* according to the Ninth Circuit, altered "the substantive relationship between employer and employee that disclosure, reporting and fiduciary duties sought to balance somewhat more equally." *Id.* at 1354. The factual predicate to *Blau,* including the "wholesale and flagrant" flouting of ERISA, warranted the imposition of a most stringent remedy. *Blau* reflects an example of the exercise of judicial discretion to remedy egregious violations of ERISA's reporting and disclosure requirements and, in fact, is entirely consistent with the Third Circuit's ruling in this case.[6]

NOTES *(Continued)*

§ 502(c)(1), contrary to petitioners' contention, creates ample incentive to distribute plan materials in a timely fashion.

6. The remaining opinions petitioners cite similarly evidence the discretionary nature of the remedies available to courts to redress the myriad sorts of claimed injuries flowing from a failure to disclose a plan. *E.g., Veilleux v. Atochem North America, Inc.,* 929

Decisions such as *Edwards v. State Farm Mut. Auto Ins. Co.*, 851 F.2d 134 (6th Cir. 1988), concerning the problems arising from a variance between a summary plan description and an undisclosed plan, similarly are not relevant to the issues in this litigation. Unlike *Edwards*, every severance document to which these petitioners point contains the very exclusion applied by the Hoechst Celanese plan administrator to deny their claim to benefits. In other words, the record in this case, fully considered by the lower courts, contains no evidence suggesting a possible conflict between disclosures made to participants and the actual plan. As such, the issues addressed in *Edwards* are irrelevant.

Lastly, the fact that court of appeals' opinions recognize the contractual nature of the relationship between a plan sponsor and participants is neither remarkable nor provides a basis for this Court's review. Here, although petitioners did not have the benefit of the written Hoechst Celanese plan document, they knew well its terms. As such, the lower courts' rulings, affirming the denial of severance benefits under ERISA, withstand scrutiny under contract principles as well. Whether analyzed as an implied-in-fact contract or under oral contract doctrines, petitioners have no right to relief.

NOTES *(Continued)*

F.2d 74, 76 (2d Cir. 1991) (per curiam) (where plaintiffs could show "no cognizable prejudice from Pennwalt's failure to comply with ERISA's disclosure requirements," no award of severance required); *Kreutzer v. A.O. Smith Corp.*, 951 F.2d 739, 743-44 (7th Cir. 1991)(no prejudice to plaintiffs requiring an award of benefits where plaintiffs were told where plan could be found; similarly-situated employees' benefits were calculated pursuant to undisclosed plan; and no evidence of bad faith). *See also Berger v. Edgewater Steel Co.*, 911 F.2d 911, 921 (3d Cir. 1990)(where neither evidence of concealment nor discriminatory treatment, failure to produce plan does not warrant a substantive remedy), *cert. denied*, 499 U.S. 920 (1991); *Simmons v. Diamond Shamrock Corp.*, 844 F.2d 517, 525 (8th Cir. 1988) (failure to disclose plan cannot support claim to benefits where name plaintiffs knew of plan's existence and plan not applied on discriminatory basis).

C.

The linchpin of petitioners' claim, under contract law or ERISA, is that the Hoechst Celanese severance plan is superseded by a "contract" to be "piece[d] together . . . from evidence of [Hoechst Celanese's] conduct." *See* Petition at 13. Following some thirteen months of discovery, petitioners failed to adduce any evidence from which such an alternative plan (or contract) could reasonably be inferred and, accordingly, the district court granted summary judgment in favor of Hoechst Celanese.

First, the oft-cited American Hoechst/Celanese Merger Agreement contains the identical pertinent exclusion as the Hoechst Celanese severance plan; applied only to former *Celanese* employees; and expired long before the sale of the PVC Division. *Gillis,* 818 F. Supp. at 809 (Pet. App. at 39a). Hoechst Celanese's aspirational "VALUES" brochures contained disclaimers stating that the brochures do not constitute plan documents. *Gillis,* 4 F.3d at 1142 & n.3 (Pet. App. at 9a); *Gillis,* 818 F. Supp. at 808-09 (Pet. App. at 37a-38a). The circumstances arising from the Spartanburg and Greer plants (involving the discharge of workers and a sale by the former Celanese company) could not reasonably form part of a plan or contract requiring benefits for these petitioners. 818 F. Supp. at 809 (Pet. App. at 39a). Documents distributed to Hoechst Canada employees were, in fact, entirely consistent with the Hoechst Celanese plan. *Id.* at 809-10 (Res. App. at 40a). Lastly, no genuine issue of material fact could possibly arise from petitioners' continued reliance on the "grapevine"[7] or, in the parlance of the rules of evidence, rank hearsay. In sum, the lower courts carefully examined, in the summary judgment process, the "evidence" compromising the alleged alternative *de facto* plan (or contract) and found no genuine issue of material fact requiring a trial.

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7. *See* Petition at 8.

CONCLUSION

Petitioners' claims were properly examined under ERISA and the decisional conflict they describe is, when evaluated against the framework of the statute's remedial provisions, illusory. The petition should be denied.

Respectfully submitted,

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APPENDIX A

ERISA section 502(a):

(a) **Persons empowered to bring a civil action.** A civil action may be brought –

(1) by a participant or beneficiary– (A) for the relief provided for in subsection (c) of this section, or (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan. . . .

ERISA section 502(c)(1):

(c)(1) **Administrator's refusal to supply requested information.** Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 606 or section 101(e)(1) with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

Supreme Court, U.S.
FILED
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No. 93-1081

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

LEONARD GILLIS, VALDO SARGENI,
for Themselves and All Others Similarly Situated,
Petitioners,

v.

HOECHST CELANESE CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

REPLY BRIEF OF PETITIONERS

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---

REPLY BRIEF OF PETITIONERS

I. THE CONFLICT IN THE CIRCUITS IS GROWING EXPONENTIALLY

The Courts of Appeals continue to flounder in a sea of inconsistency about the role of disclosure. The Fourth Circuit has withdrawn its troublesome conclusion that no communication other than a formal written document can create ERISA rights for a rehearing *en banc* on the issue posed for certiorari in this case, *Elmore v. Cone Mills Corp.*, 6 F.3d 1028 (4th Cir. 1993). In *Aiken v. Policy Mgmt Systems Corp.*, 13 F.3d 138, 17 (B.N.A.) Employee Benefits Cases 2079 (4th Cir., No. 92-2257, 1993), the Fourth Circuit joined the circuits which enforce a distributed plan description over an undisclosed plan.

The Seventh Circuit adopted contract principles as the basis for an ERISA Plan in *Meredith v. Allsteel, Inc.*, 11 F.3d 1354, 1357-1358 (7th Cir. 1993). In *Schoonejongen v. Curtiss-Wright Corp.*, —— F.3d ——, 17 (B.N.A.) Employee Benefits Cases 2041, 2046-2047, 62 U.S.L.W. 2468, 1993 WL 533734 (3d Cir. 1993), the Third Circuit held that a plan without an amendment procedure cannot be changed—rejecting its own implicit allowance of an amendment of the Merger Agreement in this case.

The Ninth Circuit has headed in exactly the opposite direction despite its prior decision in *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984). In *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 17 (B.N.A.) Employee Benefits Cases 1990 (9th Cir. Nos. 91-36195, 91-36233, 1993), the Court concluded that promised benefits in excess of an undisclosed formal document could not be awarded to employees. In *Thesenvitz v. Kaiser Engineers Hanford Co.*, —— F.3d ——, 1994 WL 35528 (9th Cir., No. 92-36592, 1994), the employees were, as here, explicitly denied access to plan documents and retired in reliance on written representations as to their monthly pension amounts by the employer and plan. The company subsequently reduced those payments by 50%-67% per month based on the undisclosed plan documents. The Ninth Circuit incredibly denied the employees both the promised benefits and relief from their retirement decisions. The Ninth Circuit decisions reflect the same fundamental error as in this case by confusing the ministerial writing requirement of 29 U.S.C. § 1102(a)(1) with the definition of a "plan" under 29 U.S.C. § 1002(1), (2). The Hanford plan was never integrated through disclosure. Its unintegrated "plan," based on explicit disclosures to employees of promised benefits, may be enforced directly under 29 U.S.C. § 1132(a)(1)(B).

II. THE SUMMARY JUDGMENT IN FAVOR OF HOECHST RESTS ENTIRELY ON THE UNDISCLOSED AND UNAUTHENTICATED "1989" PLAN

Hoechst begs the entire issue of disclosure and puts the cart before the horse by assuming that a formal "writing" is a precondition to a "plan." Its brief in opposition focuses on a purported exclusion for sales in other documents. The claim ignores the lack of a writing requirement in the definition of a "plan" and the critical importance of judicial deference to Hoechst's "interpretation" of the "plan" in granting summary judgment.

The Third Circuit emphasized that the undisclosed "1989" document was critical in two respects. It was substantively important in its sales exclusion, Petition, pp. 8a, 5a and the absence of benefits for reductions in pay and voluntary terminations covered by the Merger Agreement, *see infra*. It was procedurally critical in allowing the Court to limit review to an "arbitrary or capricious" standard and thus avoid triable issues of fact concerning the terms of an unintegrated plan or ambiguities in documents subject to *de novo* interpretation by a court, Petition, pp. 5a-6a. Hoechst Celanese loses its summary judgment on severance pay without both of these critical after-the-fact additions through the phony "1989" policy.

A. The "Plan"

The only information disseminated to employees by Hoechst Celanese suggested that their benefits would be the same as pre-merger Celanese benefits. The pre-merger Celanese separation pay policy had no sales exclusion. Delaware City employees knew this from a pre-merger sale of Celanese facilities in Greer, South Carolina to their division of American Hoechst. The publicly filed original version of the Merger Agreement between American Hoechst and Celanese similarly lacked any sales lan-

guage and confirmed that such a plan and practice existed.[1]

The other documents disseminated by Hoechst promised fair treatment—leaving employees with the impression that they would receive the same benefits as they had seen elsewhere in the wake of the merger (and heard about, after the fact, for selected Delaware City employees). Absent "integration" through disclosure of different terms to employees, a trial court or jury rationally could find that the unintegrated plan followed prior Celanese practice—with no sales exclusion.

B. The Merger Agreement—Without Deference

The loss of an "arbitrary or capricious" standard dooms the summary judgment in favor of Hoechst in looking at other documents. The Merger Agreement had no provision to limit judicial review. Neither does any prior American Hoechst policy or other document.

The only publicly available severance pay document was the "tin parachute" clause in the Merger Agreement. The version originally filed with the SEC had no sales exclusion. An amendment revised the severance clause to include the sales exclusion of a prior American Hoechst policy and read as follows:

> (h) *Salary Continuation; Separation Pay; Other Benefit Plans.* Notwithstanding the terms of and in lieu of payment from the Company's salary continuation or written separation pay policy, for each employee of the Company, the Surviving Corporation or either of their subsidiaries . . . whose employment is hereafter terminated by Buyer, the Company (at the direction of Buyer, directly or indirectly), the Surviving

---

[1] Hoechst Celanese has not been able to locate a prior Celanese Corporation severance pay document. It was within the domain of Mr. Silversten, a former Celanese employee, who directed the Mirrex sale in-house. He now directs the corporate litigation response.

Corporation or its subsidiaries for any reason (other than for cause, death, disability, mandatory retirement or sale of all or part of a business, whether at one or more plant locations, where the acquiring company offers the affected employees continued employment and those employees accept such continued employment, and other than the previously announced shutdown of the Company's Greenville, South Carolina plant and the previously announced capacity reduction at the Company's Salisbury, North Carolina plant) at any time prior to January 1, 1989 or the second anniversary of the Effective Time, whichever is later (the "Termination Period"), or who elects to terminate his employment prior to the expiration of the Termination Period by reason of a reduction in his base salary, Buyer will provide, or will cause the Company or Surviving Corporation to provide, (i) for each such employee who is eligible to receive EIC for 1986 (approximately 175 people), . . .

* * * *

and (ii) for all such other employees, separation pay, payable in a single sum within ten business days following such termination, equal to two weeks' base salary for each full or partial year of service with the Company and Surviving Corporation plus an additional two weeks' base salary.

* * * *

An employee who is not entitled to the above described salary continuation payments or separation pay by reason of the fact that his employment was terminated as a result of a sale of a business and he accepted continued employment with the acquiring company shall nevertheless become entitled to such salary continuation payments or separation pay in the event that his employment is terminated (other than for cause, death, disability or mandatory retirement) by the acquiring company within one year of the commencement of such employment. The amount of such salary continuation payments or separation pay

> shall be reduced by the amount, if any, of any separation pay received by the employee from the acquiring company.

The changes simply added a sales exclusion without thought for its interplay with the provisions allowing severance pay on a "direct or indirect" reduction in pay, voluntary retirement or a simple quit or refusal to accept work with a buyer. The Merger Agreement is, at best, ambiguous as a result on sales.

The grafted plan is rationally read to deny severance pay only on a sale which continues the same pay structure. Applying a fresh look without deference, the Court in *Shawyer v. R.H. Macy & Co., Inc.*, 697 F.Supp. 1515, 1525-1526 (W.D. Mo. 1988) so construed a plan with similar ambiguities. See also, *Meredith v. Allsteel, Inc.*, 11 F.3d at 1357-1358 (plan is a contract which is construed against the draftor). Affidavits established that Hoechst paid double severance to employees who never lost a day of work. The provisions for lump sum payments on voluntary retirement or a reduction in pay plainly contemplate a severance plan providing compensation for loyal past service or liquidated damages for lost expectations in moving to a smaller and less stable company, *Barnett v. Petro-Tex Chemical Corp.*, 893 F.2d 800, 809 (5th Cir. 1990); *Bennett v. Gill & Duffus Chemicals, Inc.*, 699 F.Supp. 454, 459 (S.D.N.Y. 1988). The concept of an "indirect" termination by a reduction in pay under the Merger Agreement is meaningless without an interpretive gloss to limit the sales exclusion to comparable buyers and pay structures.

In this case, the employees lost basic pay through an immediate reduction in vacation pay. Cf. *Massachusetts v. Morash*, 490 U.S. 107, 115-118, 109 S.Ct. 1668 (1989) (vacation excluded from ERISA as wages). This reduction in pay and additional loss of benefits obviously was pre-planned by Hoechst Celanese and Mirrex in order to pay the leveraged buyout debt financed by Hoechst.

Hoechst agreed to deliver the employees to Mirrex as a group in order to convey a going business. It avoided disclosure in order to keep employees from exercising their option to retire or resign in order to receive severance pay under the Merger Agreement in order to facilitate its deal.[2] Hoechst affirmatively lied to the employees (after the sales announcement fixed liability under the Merger Agreement) in telling them that there was no severance pay plan even if the employees declined work with Mirrex. Without disclosure of written documents, the employees could not gamble their families on unknown benefits nor explain the discrepancy between Hoechst's statements in Delaware and its contrary and contemporaneous actions elsewhere.

In his deposition, Mr. Silversten, the in-house labor attorney and witness for Hoechst, admitted that coverage under the Merger Agreement was based on the date of the announcement—not actual payroll termination:

> Q. Did Celanese have a facility in Salisbury, North Carolina?
>
> A. Yes.
>
> * * * *
>
> Q. What happened, if anything, to it?
>
> A. Well, we still have it. So, it was neither sold, nor shut down. There were cutbacks at that plant, business reorganizations, and restructuring that resulted in a certain number of people losing their jobs, but we did not either sell or close the plant.
>
> Q. Was separation pay paid to those people—those salaried employees who lost their jobs?
>
> A. I believe so.

---

[2] Two employees with prior merger and sales experience at Union Carbide did elect to retire before the sale simply to lock in their known pension and retiree medical benefits at Hoechst. They received severance pay even though they were subsequently hired by Mirrex. Mr. Sargeni was in a position to do the same had the Merger Agreement been disclosed.

Q. How much?

A. One week for each year of service with the corporation, plus one additional week. Ten years of service, you get 11 weeks.

Q. Was that the prior Celanese plan?

A. Yes, it was. Let me clarify that, to give you the full picture and not mislead anybody. The announcement on the cutbacks took place at about the same time as the merger agreement. So, a question arose as to whether the separation pay provisions of the merger agreement, which gave two weeks for each year of service, plus two, double severance, as we called it, would apply. The decision was made, I believe correctly, that for the terminations that had been announced prior to the merger, that that had nothing to do with the merger, and those people would get the normal severance, but that the other terminations that were not announced and did not take place until the two-year period between February '87 and February '89, were covered by the merger agreement, and that those people got, using this term again, double severance of two weeks for each year of service, plus two weeks. So, there was some Salisbury people who got one plus one, and there were some Salisbury people who got two plus two. I want to make sure you get the full picture.

An affidavit from a former South Carolina employee separated from payroll after February, 1989 who received "double severance" confirmed that the critical event was the announcement--not the actual date of payroll separation. The sale of Delaware City was announced in January, 1989 before the stated expiration of the Merger Agreement.

Mr. Silversten also testified that the Merger Agreement was applied to another sale to a less stable venture capital firm.

Q. Did Celanese—excuse me.

Did Hoechst Celanese sell any facility in that period from 1987 to 1989?

A. I'm trying to get the time frame straight in my mind. Celanese was obligated—excuse me, Hoechst Celanese was required by the FTC, as part of their approval process, on the merger, to sell two plants, one in Fayetteville, North Carolina, and one in Florence, South Carolina.

Q. Was separation pay paid to salaried employees in those instances?

A. I'm trying to remember. I believe that it was.

Q. Who were they sold to?

A. It was sold to a company that took the name Fiber Industries, Inc. I don't recall the name of the —it was a merger capital group who bought it and then formed Fiber Industries, Inc. or FII.

Q. Did Fiber Industries offer continuing employment to salaried employees?

A. To most employees. . . .

Mr. Silversten likewise admitted application of the Merger Agreement provisions to American Hoechst employees. This was consistent with the definition of "Surviving Corporation" (as used in the Merger Agreement and its severance clause) to refer to the corporation resulting from the merger of Celanese Corporation and American Hoechst Corporation. An affidavit of a former American Hoechst employee in South Carolina confirmed the payment of "double severance" to former American Hoechst employees who left the payroll well after February, 1989.

The Third Circuit decided to relieve Hoechst Celanese from what it apparently perceived as an unwise bargain. Its actions violated basic principles of summary judgment and contract. American Hoechst and Celanese negotiated double severance for employees. They promised fair treatment to their employees to induce loyal and productive work in the downsizing and integration following the merger. There is no justice or law in discriminatorily and arbitrarily denying these benefits to the employees in this case. They must finance their own retiree medical costs in the wake of reduced employment at Mirrex and have

lost pay, benefits and expectations in the trauma of the sale after long years of service. Our law and economy rest on the sanctity of contracts and preclude post-hoc judicial modification of an arm's-length deal.

CONCLUSION

The Court should reaffirm the basic rules of summary judgment and contracts by granting the petition for a writ of certiorari.

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